Supreme Court, U.S.
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No. 03-1235 FEB 27 2004

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

v.

ANTHONY CHARLES DAVIS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May an appellate court consider the consecutive and mandatory nature of sentences imposed for multiple offenses committed on separate occasions in determining whether the sentences violate the Eighth Amendment to the United States Constitution?

2. Did the Arizona Supreme Court's subjective evaluation of the gravity of the crime of sexual conduct with a minor and of Davis's culpability violate *Harmelin v. Michigan*'s holding that the Eighth Amendment's "gross disproportionality" analysis must defer to the legislature's penological judgments and be guided by objective factors?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona respectfully petitions for a writ of certiorari to review the Arizona Supreme Court's October 30, 2003 opinion that held that the trial court's imposition of four consecutive but mandatory-minimum terms of 13 years' imprisonment for four convictions for sexual conduct with a minor violated the Eighth Amendment.

OPINIONS BELOW

The Arizona Supreme Court's opinion is reported as *State v. Davis*, 79 P.3d 64 (Ariz. 2003). Petitioner's Appendix ("Pet. App.") A. The Arizona Court of Appeals' memorandum decision is unreported. Pet. App. B.

STATEMENT OF JURISDICTION

The Arizona Supreme Court issued its decision on October 30, 2003. Petitioner requested and received from this Court an extension of time to file its petition for writ of certiorari until February 27, 2004, and it timely filed the petition by that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Twenty-year-old Davis committed four separate acts of sexual conduct with a minor—Arizona's statutory rape offense—against one 13-year-old and one 14-year-old child. The trial court, following state law, sentenced him to four consecutive mandatory-minimum sentences of 13 years' imprisonment for each offense. On appeal, a majority of the Arizona Supreme Court found that the *aggregate* total of the sentences—and the sentences' mandatory nature—constituted cruel and unusual punishment under the Eighth Amendment, based on its subjective perception of (1) the relative culpability of Davis and the children, (2) the prevalence of sexual activity among "post-pubescent" children, (3) Davis's immaturity, and (4) the "benignity" of Davis's conduct. Pet. App. A at 72, ¶ 36. The supreme court's opinion conflicts with decisions from other state and federal courts holding that the mandatory and consecutive nature of punishments is irrelevant under the Eighth Amendment. The opinion also conflicts with this Court's decision in *Harmelin v. Michigan* which holds that "proportionality review" requires deference to the legislature's penological judgments and must be based on "objective factors." 501 U.S. 957, 1000 (1991). This Court should grant certiorari to establish that an appellate court analyzing sentences under the Eighth Amendment must consider each sentence individually, defer to the legislature's penological judgments, and be guided by objective factors.

A. MATERIAL FACTS.

In January 1999, 13-year-old T.E.[1] lived with her mother, stepfather, and stepsister C.M. (R.T. 10/20/99, at 26.) In mid-January, T.E., C.M., and T.E.'s friend P.T.—who had celebrated her fourteenth birthday a few weeks earlier—met 19-year-old Jason Christiano at Superstition Mall in Mesa, Arizona. (*Id.* at 26–28, 68.) One night shortly thereafter, T.E. and C.M. "snuck" out of their house to meet Jason at a park, and Jason drove them to Davis's house. (*Id.* at 28–29.) T.E. met Davis, and they "hung out" together. (*Id.* at 30.) Davis had

1. Initials have been used to protect the children's identities.

sexual intercourse with T.E. that night, even though she told him that she was "14" years old. (*Id.* at 29, 31–32.)

Around midnight on another night in January, T.E., C.M., and P.T. "snuck" out and met Jason at the park, and he drove them all to Davis's house. (*Id.* at 70–71.) At the house, Davis talked with P.T. and asked how old she was. (*Id.* at 72–73.) P.T. told him that she was 14 years old, and Davis asked her if she would go into the bedroom with him. (*Id.* at 71–73.) P.T. thought being with a 20-year-old man was "exciting," so she accompanied Davis to the bedroom, where they had sexual intercourse. (*Id.* at 72–73.) Davis also had sexual intercourse with P.T. on two subsequent occasions. (*Id.* at 74–75.)

The girls' parents soon learned that P.T. and T.E. had been consorting with Davis and his cohorts, and P.T. told her parents that she and T.E. had had sex with Davis. (*Id.* at 77–78; R.T. 10/21/99, at 10.) T.E., C.M., and P.T. consequently ran away after school on January 29, 1999, the Friday before the Superbowl, and Jason took them to Davis's house. (R.T. 10/20/99, at 33–36, 50.) Although P.T. returned home that night, T.E. and C.M. stayed at Davis's house the whole weekend. (*Id.* at 44–46.) Davis had sexual intercourse with T.E. on Superbowl Sunday. (*Id.* at 32, 42.)

The police searched for T.E. and C.M. as runaways, and they found them at Davis's house on the morning of February 1, 1999. (*Id.* at 14, 20.) T.E. and C.M.'s mother reported Davis's sexual activity to the police and had a doctor examine T.E. (*Id.* at 55; R.T. 10/21/99, at 36.) The doctor found indications that T.E. had engaged in sexual intercourse. (R.T. 10/20/99, at 60.)

The police had P.T. make a confrontation call to Davis. (R.T. 10/21/99, at 23.) During the conversation, Davis admitted that he had had sex with P.T. and said that he wished that she were 18 years old. (R.T. 10/20/99, at 80–81.) Davis told P.T. that the fact that she was only 14 years old bothered him "because of all the cops." (*Id.*) Toward the end of the conversation, Davis asked her, "Can you fuck me one time?" (*Id.*)

B. Proceedings Below.

The State charged Davis with four counts of sexual conduct with a minor, which are class two felonies and dangerous crimes against children. Davis claimed in defense that he had not engaged in sexual intercourse with T.E. and that, while he had engaged in sexual intercourse with P.T. three times, he thought that she was 18 years old. (R.T. 10/21/99, at 64, 67, 71.) The jury found Davis guilty of all the charges, and the trial court subsequently sentenced him to four consecutive mandatory-minimum terms of 13-years' imprisonment for each offense.[2] (R.T. 12/9/99, at 10.)

On appeal to the Arizona Court of Appeals, Davis raised two claims: (1) the erroneously worded instructions and verdict forms allowed the jurors to reach nonunanimous verdicts; and (2) the aggregate total of his terms of imprisonment—52 years—violated the Eighth Amendment's proscription against cruel and unusual punishment. Pet. App. B at 6, ¶ 16. A majority of the court rejected each claim.[3] Pet. App. B at 9–10, ¶¶ 25–27. Regarding the Eighth Amendment claim, the majority explained that in *State v. DePiano*, 926 P.2d 493 (1996), the Arizona Supreme Court had interpreted Justice Kennedy's plurality opinion in *Harmelin* to limit the gross disproportionality analysis to a consideration of (1) the general nature of the offense in question without regard to the particular facts and

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2. The trial court recommended to the Arizona Board of Executive Clemency that Davis's sentences be reduced. (R.T. 12/6/99, at 13.) While the Board acceded to the trial court's recommendation and requested that the Governor of Arizona commute his sentences, the Governor denied the request. Davis again applied for clemency in October 2003, but the Board declined to request commutation from the Governor.

3. One member of the three-judge panel dissented from the majority's conclusion that the instructions and verdicts on two of the charges were correct, and would have reversed for a new trial on those two charges. (Pet. App. B at 16, ¶ 41) (Noyes, J., concurring in part, dissenting in part). Consequently, other than to note that the mandatory sentences were "lawful but absurd," the dissent did not pass upon the majority's conclusion that the sentences did not violate the Eighth Amendment, and that Davis should seek executive clemency. (*Id.* at 17, ¶ 45.)

circumstances of a given case and (2) the reasonableness of the legislature's determination that the offense represents a sufficient threat to the individual and to society to warrant the punishment imposed. Pet. App. B at 13–14, ¶¶ 37–38. The majority found that considering the threat that sexual conduct with minors poses to individuals and to society, the legislature rationally could have determined that severe sentences were warranted. *Id.* at 15, ¶ 39.

Davis raised the same claims in a petition for review to the Arizona Supreme Court. A majority of the supreme court reversed the court of appeals' opinion, finding that Davis's sentences violated the Eighth Amendment.[4] The majority began its analysis by overruling its previous opinion in *DePiano*. Pet. App. A at 12, ¶ 34. It determined that *DePiano*'s holding—that *Harmelin* does not permit a consideration of the facts and circumstances of a case—was incorrect in light of this Court's holdings in *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Ewing v. California*, 538 U.S. 11 (2003). Pet. App. A at 10–13, ¶¶ 30–34. The majority reasoned that considering the particular facts and circumstances of a case was appropriate under *Harmelin* because—in the majority's view—this Court had done so in *Andrade* and *Ewing*. Pet. App. A at 10–11, ¶¶ 30–31.

The majority therefore considered the facts and circumstances of Davis's case in applying *Harmelin*'s gross disproportionality analysis. *Id.* at 13, ¶ 36. The majority initially noted that the trial court, the jurors, the presentence report writer, and the victims' mothers believed that the sentences were "extraordinarily long." *Id.* The majority then identified five factors that it felt were relevant to determining that Davis's sentences were grossly disproportionate: (1) Davis's sexual activity with the children was nonviolent; (2) Davis had no adult criminal record and had never before committed crimes against children; (3) post-pubescent children are commonly sexually active; (4)

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4. The majority considered whether the sentences violated the Cruel and Unusual Punishment provision of the Arizona Constitution, but determined that the Arizona Constitution provided no greater protection than the Eighth Amendment. Pet. App. A at 4, ¶ 12.

"the record" contained "evidence" that Davis's level of intelligence and maturity "fell far below" that of a normal young adult; and (5) Davis's "benign" "boyfriend-girlfriend" situation was less serious than other situations that constitute sexual conduct with minors. *Id.* at 13, ¶ 36. Considering these factors, the majority concluded that Davis's sentences "appeared to be grossly disproportionate to his crimes." *Id.* at 14, ¶ 37.

Finding that the sentences satisfied the threshold of gross disproportionality, the majority validated its conclusion, in accordance with *Solem v. Helm*, 463 U.S. 277 (1983), by comparing Davis's sentences with sentences imposed in Arizona for more serious crimes and with sentences imposed in other states for the same crimes. Pet. App. A at 15–19, ¶¶ 38–46. The majority found that "more serious crimes" in Arizona, such as second-degree murder, sexual assault, and continued sexual abuse of a minor, have the same sentence as Davis's crimes and that other serious felonies that do not involve children have less severe sentences than do Davis's crimes. *Id.* at 15–16, ¶¶ 39–40. The majority also found that Arizona had the most severe sentences of any state for Davis's crimes. *Id.* at 18–19, ¶¶ 44–46. Consequently, the majority concluded that Davis's sentences failed the gross disproportionality test. *Id.* at 19, ¶ 46.

The majority recognized that the consecutive nature of the sentences is "normally" not a proper consideration in a gross disproportionality analysis, but believed that this case "crie[d] out" for a departure from that "general rule." *Id.* at 20, ¶ 47. The majority stated that it "in part" found that the sentences were grossly disproportionate because Arizona judges had no discretion to decline to impose minimum and consecutive sentences. *Id.* The majority recognized the state legislature's right to impose a mandatory minimum sentence of 13 years' imprisonment for a dangerous crime against children, as well as its right to require the sentences to be served consecutively and completely. *Id.* The majority nevertheless held that such sentences could not be upheld if those otherwise proper requirements made the sentences unconstitutionally disproportionate. *Id.*

Consequently, the majority found that Davis's four consecutive 13-year sentences for four separate convictions for sexual conduct with a minor violated the Eighth Amendment and ordered Davis to be resentenced without the dangerous crimes against children enhancement set forth in A.R.S. § 13–604.01. *Id.* at 20–21, ¶ 48. The majority also agreed in part with Davis's contention that the instructions and verdicts created the possibility that the verdict on one charge could have been nonunanimous, and ordered Davis retried on that one charge. *Id.* at 25, ¶ 61; 28, ¶ 72.

Vice Chief Justice McGregor dissented from the majority's finding that the sentences violated the Eighth Amendment because she believed that the majority had applied an incorrect analysis and relied on improper factors in reaching its conclusion. *Id.* at 29, ¶ 74. According to Justice McGregor, an Eighth Amendment analysis requires the application of the relevant principles that Justice Kennedy set forth in his plurality opinion in *Harmelin*: (1) the fixing of prison terms for specific crimes is a legislative—not judicial—prerogative; (2) the Eighth Amendment allows states to adopt a variety of penological theories in developing their sentencing statutes; and (3) proportionality review must be based on objective factors.[5] *Id.* at 34–40, ¶¶ 85–101. Applying these principles, Justice McGregor found that the sentences did not violate the Eighth Amendment for three reasons.

First, the majority failed to defer to the Arizona Legislature's judgments regarding the appropriate sentence for the crimes that Davis committed. Justice McGregor noted that, in enacting the Dangerous Crimes Against Children Act, the Legislature intended to protect children and to punish severely those who prey upon children and who do so repeatedly. *Id.* at 34, ¶ 86. She found that the majority's reliance on its five factors was merely a refusal to defer to the Legislature's judgment. *Id.* at 34, ¶ 87. Although the majority found that the children

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5. Justice Kennedy identified an additional principle—the federal system of government allows for different sentencing schemes in the various states—but Justice McGregor found this principle inapplicable to her analysis. Pet. App. A at 40, ¶ 101 n.18.

had "consented" to the sexual acts, the Legislature had determined that sexual conduct with children under 15 years old constituted a criminal offense regardless of consent. *Id.* at 35–36, ¶¶ 88–91. Although the majority found that sexual activity among post-pubescent children was common, the Legislature was aware of that circumstance when it enacted the sentence enhancement statute. *Id.* at 37, ¶ 94. Although the majority determined that Davis's conduct should not be included within the ambit of the dangerous crimes against children statute, that is a legislative judgment. *Id.* at 37–38, ¶¶ 96–97.

Second, the majority failed to acknowledge that the Legislature chose appropriate penological goals in enacting the Dangerous Crimes Against Children Act. *Id.* at 39, ¶ 99. The Legislature adopted the Act to protect children, to punish those who harm them, and to deter repeat offenders. *Id.* Protection, punishment, and deterrence are appropriate penological goals, and Davis's sentences imposed pursuant to those goals did not violate the Eighth Amendment. *Id.*

Third, the majority did not use objective factors to guide its proportionality review. *Id.* at 40, ¶ 100. The majority's factors provide no guidance to the state trial courts to determine when they could constitutionally apply the Dangerous Crimes Against Children Act and when they could not and did not provide the "objective analysis envisioned by *Harmelin/Ewing*." *Id.* at 40, ¶¶ 100–01.

Justice McGregor also found the majority's intrajurisdictional comparison of Davis's sentences with sentences for "more serious crimes" contrary to the Legislature's judgment. Although the majority deemed some crimes "more serious" than Davis's crimes for its comparative analysis, Justice McGregor believed that the seriousness of crimes was the Legislature's choice to make, and that it had decided that Davis's crime of having sexual intercourse with 13- and 14-year-old children was "a very serious crime" because of the severity of the sentences it had authorized. *Id.* at 41, ¶ 103.

Justice McGregor further found that the majority improperly considered the consecutive and mandatory nature of the sentences in its

gross disproportionality analysis. *Id.* at 43–44, ¶¶ 106, 108. She noted that the majority would not have found the sentences unconstitutional but for their consecutive nature and that the majority never examined the reason that the Legislature required the sentences to be served consecutively. *Id.* at 43, ¶ 106. She recognized that this Court did not hold in *Ewing* that the mandatory nature of a sentence was constitutionally significant. *Id.* at 44, ¶ 108. She also concluded that the majority should not have considered the subjective opinions of the trial judge, the jurors, or the victims' mothers regarding the appropriate sentences, because the Legislature—as a representative body—better reflects societal norms than do the individuals involved in a particular case. *Id.* at 43, ¶ 107.

REASONS TO GRANT THE PETITION

I

THE ARIZONA SUPREME COURT'S CONSIDERATION OF THE MANDATORY AND CONSECUTIVE NATURE OF THE SENTENCES IN CONDUCTING ITS EIGHTH AMENDMENT ANALYSIS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS.

The majority decided that Davis's sentences were grossly disproportionate "in part because judges in Arizona have no discretion regarding the minimum sentence and must impose consecutive sentences." Pet. App. A at 20, ¶ 47. This conclusion conflicts with decisions from this Court holding that a sentence's mandatory nature does not make it cruel and unusual under the Eighth Amendment. *Harmelin*, 501 U.S. at 995; *id* at 1006–07 (Kennedy, J., concurring); *Chapman v. United States*, 500 U.S. 453, 467 (1991). The conclusion also conflicts with decisions from other federal and state courts holding that imposition of consecutive sentences for separate offenses does not implicate any Eighth Amendment concerns. *See, e.g.*, *Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999); *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988); *Close v. People*, 48 P.3d 528,

538–40 (Colo. 2002); *Malee v. State*, 809 A.2d 1, 8 (Md. Ct. Spec. App. 2002).

Mandatory sentencing provisions, such as the one that the Arizona Legislature enacted in the Dangerous Crimes Against Children Act, do not implicate the Eighth Amendment. Outside the context of the death penalty—where the "qualitative difference" between death and all other penalties requires an "individualized" determination of the propriety of a death sentence—the Eighth Amendment does not require state legislatures to enact sentencing statutes that allow for the consideration of mitigating circumstances in affixing the appropriate punishment. *Harmelin*, 501 U.S. at 995. "It is beyond question that the legislature 'has the power to define criminal punishments without giving the courts any sentencing discretion.'" *Id.* at 1006 (Kennedy, J., concurring) (quoting *Chapman*, 500 U.S. at 467). Congress and the States have commonly enacted mandatory sentencing schemes "throughout our Nation's history." *Harmelin*, 501 U.S. at 994–95. Finding that a sentence violates the Eighth Amendment because the state legislature has determined as a matter of public policy that a particular sentence should be mandated for a particular crime rejects the "collective wisdom" of the state legislature and, by extension, the state's citizenry. *Id.* at 1006 (Kennedy, J., concurring); *see also Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (in noncapital cases, individualized sentencing "rests not on constitutional commands, but on public policy").

But rejecting the Arizona Legislature's "collective wisdom" that dangerous crimes against children warrant particular fixed sentences is precisely what the majority of the Arizona Supreme Court did by holding that the mandatory nature of Davis's sentences made them unconstitutional. Although the majority recognized that the Legislature had the right to impose a 13-year minimum sentence for each of Davis's crimes, it found that the Legislature's decision was unconstitutional because it did not account for "the specific facts and circumstances of Davis's offenses." Pet. App. A at 20–21, ¶ 48. The majority's conclusion is nothing more than a repudiation of the Legislature's judgment that mandatory sentencing for dangerous crimes against

children is appropriate. This directly conflicts with this Court's decisions in *Harmelin* and *Chapman*.

The majority's conclusion conflicts not only with *Harmelin* and *Chapman*, but also with other federal and state court decisions holding that the imposition of consecutive sentences does not implicate the Eighth Amendment. Although no decision from this Court has ever held that the consecutive nature of sentences is irrelevant under the Eighth Amendment, this Court agreed with this proposition in dicta in *O'Neil v. Vermont*, 144 U.S. 323 (1892). In that case, this Court dismissed a petition for writ of certiorari from O'Neil—who was convicted of 307 counts of selling intoxicating liquor and was given 307 consecutive sentences—because none of the issues that he presented involved a federal question. *Id.* at 327, 331, 336. This Court noted that O'Neil's case did involve a federal question—the propriety of O'Neil's sentences under the Eighth Amendment—but the Court declined to address it because O'Neil did not raise it in his certiorari petition. *Id.* at 331. Nevertheless, it favorably quoted the Vermont Supreme Court's decision finding no Eighth Amendment violation:

> 'The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. . . . If the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.'

Id. (quoting *State v. Four Jugs of Intoxicating Liquor*, 2 A. 586, 593 (Vt. 1886)).

Most federal and state courts have explicitly or implicitly agreed with *O'Neil* and have held that consecutive sentences do not implicate the Eighth Amendment, and that sentences must be considered

individually according to each corresponding conviction. *E.g.*, *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *Hawkins*, 200 F.3d at 1285 n.5; *Aiello*, 864 F.2d at 265; *Close*, 48 P.3d at 538; *Hall v. State*, 823 So. 2d 757, 760–61 (Fla. 2002); *Malee*, 809 A.2d at 8; *People v. Miles*, 559 N.W. 2d 299, 302 (Mich. 1997). The rationale underlying this conclusion is that governments should be able to punish defendants for each distinct crime that they commit:

> Jurisdiction to inflict cumulative punishment is dependent . . . upon the fact that distinct violations of the law have been committed by one individual whose malefactions merit separate and, therefore, cumulative penalties.

Rigor v. State, 61 A. 631, 633 (Md. 1905). To hold otherwise allows a defendant to generate an Eighth Amendment claim simply by committing a great number of crimes. *Pearson*, 237 F.3d at 886. If cumulative punishments mattered, the sentence permitted under the Eighth Amendment would become increasingly shorter for every crime a defendant commits after his first crime:

> Taken to its extreme, it would require [a court] to find that virtually any sentence, however short, becomes cruel and unusual punishment when the defendant was already scheduled to serve lengthy sentences for prior convictions.

United States v. Schell, 692 F.2d 672, 675 (10th Cir. 1982). To avoid such absurd consequences, the gross disproportionality inquiry under the Eighth Amendment must be limited to examining each sentence imposed individually for each conviction.

But the majority in *Davis* disregarded these decisions and based its gross disproportionality determination on the cumulative sum of Davis's sentences—52 years.[6] Pet. App. A at 21, ¶ 49. The majority did

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6. The majority based its Eighth Amendment analysis on the 52-year cumulative length of Davis's sentences, even though it subsequently remanded one of Davis's (continued...)

so apparently because it could not otherwise hold that 13 years' imprisonment was a grossly disproportionate sentence for the crime of sexual conduct with a minor:

> We recognize the legislature's right to impose a thirteen-year minimum sentence for dangerous crimes against children and to require the sentence to be served completely. We also recognize the legislature's right to require consecutive sentences for this type of offense. We cannot, however, uphold a sentence that becomes unconstitutionally disproportionate to the crimes committed because the sentences are mandatorily lengthy, flat, and consecutive.

Id. at 20–21, ¶ 48. The clear meaning of this passage is that the majority did not believe that the *individual* 13-year sentences violated the Eighth Amendment—it recognized the Legislature's right to require such a sentence. The majority may have realized, but failed to acknowledge, that finding such a sentence grossly disproportionate would be difficult to justify when compared with the much harsher sentences that this Court has upheld under the Eighth Amendment. *See Harmelin*, 501 U.S. at 961 (life imprisonment without possibility of parole for single conviction for possession of 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370–71 (1982) (two consecutive 20-year sentences and a $10,000 fine for one conviction for possession of nine ounces of

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6. (...continued)
convictions for retrial, which reduced the cumulative length of his sentences to 39 years. Pet. App. A at 28, ¶ 72. The reduction in the cumulative length of the sentences was irrelevant to the majority's analysis. As the majority explained, it believed that the sentences violated the Eighth Amendment because they were "mandatorily lengthy, flat, and consecutive." *Id.* at 20–21, ¶ 48. Davis's sentences were just as "mandatorily lengthy, flat, and consecutive" at 39 years as they were at 52 years. Moreover, the majority found that Davis's sentences violated the Eighth Amendment *before* it analyzed the trial issue that required the vacation of one of Davis's convictions. If the majority believed that the reduction to 39 years had any significance to its Eighth Amendment analysis, it would have vacated the one erroneous conviction and *then* determined the Eighth Amendment claim. Its failure to do so shows that it found that the sentences violated the Eighth Amendment even if their cumulative length was only 39 years.

marijuana and one conviction for selling marijuana). Instead, the majority decided that the *cumulative* length of the sentences—regardless of the fact that Davis had committed four separate offenses on different occasions—violated the Eighth Amendment. Thus, according to the majority, the cumulative length of a criminal defendant's sentences—no matter how many distinct offenses meriting punishment the defendant has committed—is what matters under the Eighth Amendment.

This analysis and the resulting conclusion conflict with the decisions of this Court and the decisions of other federal and state courts. This Court should grant certiorari in this case to hold that the mandatory and consecutive nature of sentences for multiple crimes is not a proper consideration in determining whether a sentence is grossly disproportionate under the Eighth Amendment.

II

THE ARIZONA SUPREME COURT'S SUBJECTIVE EVALUATION OF THE GRAVITY OF THE CRIME OF SEXUAL CONDUCT WITH A MINOR AND OF DAVIS'S CULPABILITY CONFLICTS WITH *HARMELIN*'S HOLDING THAT THE EIGHTH AMENDMENT'S "GROSS DISPROPORTIONALITY" ANALYSIS MUST DEFER TO THE LEGISLATURE'S PENOLOGICAL JUDGMENTS AND BE GUIDED BY OBJECTIVE FACTORS.

In determining that Davis's sentences were grossly disproportionate to his crimes, the majority flouted this Court's Eighth Amendment jurisprudence in two respects. First, the majority refused to defer to the Arizona Legislature's penological judgment that sexual conduct with a minor is a serious crime that warrants severe punishment, and substituted its own subjective evaluation of that crime's gravity. Second, the majority eschewed any consideration of objective factors that would explain the Legislature's judgment and instead relied on its subjective evaluation of Davis's culpability and the circumstances of his crimes to reach its conclusion. The majority's

approach directly conflicts with this Court's holding in *Harmelin* that gross disproportionality analysis requires courts to (1) defer to a legislature's penological judgments about the gravity of crimes and the appropriate punishments for those crimes, and (2) be guided by objective factors. 501 U.S. at 998–1001 (Kennedy, J., concurring).[7]

In *Harmelin*, this Court set forth four principles that guide its Eighth Amendment analysis in determining whether a defendant's sentence is grossly disproportionate to his crime. 501 U.S. at 998 (Kennedy, J., concurring). First, "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)). A state legislature "has the primary responsibility for making difficult policy choices that underlie any criminal sentencing scheme." *Ewing*, 538 U.S. at 28. Making the difficult policy choices requires difficult line-drawing that is "pre-eminently the province of the legislature." *Rummel*, 445 U.S. at 275. Courts "do not sit as a 'superlegislature' to second-guess these policy choices." *Ewing*, 538 U.S. at 28. Reviewing courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem*, 463 U.S. at 290. A particular sentencing choice will comport with the Eighth Amendment as long as the legislature "has a reasonable basis" for finding that the choice will "'advance[] the goals of [its] criminal justice system in any substantial way.'" *Ewing*, 538 U.S. at 28 (quoting *Solem*, 463 U.S. at 297 n.22).

Second, the Eighth Amendment "does not mandate the adoption of any one penological theory." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). State sentencing codes may be based on many different and often conflicting goals–such as retribution, deterrence, incapacitation, and rehabilitation–and the relative pre-

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7. Because of the fractured nature of the Justices' opinions in *Harmelin*, this Court has subsequently deemed Justice Kennedy's concurring opinion the controlling opinion on the appropriate analysis to apply in Eighth Amendment cases. *Ewing*, 538 U.S. at 23–24.

eminence of these goals may shift with the times. *Id.*; *see, e.g.*, *Ewing*, 538 U.S. at 14 ("California's three strikes law reflects a shift in the State's policies toward incapacitating and deterring repeat offenders who threaten the public safety.").

Third, sentencing codes will inevitably vary from state to state. *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). States have independent power "to articulate societal norms through the criminal law." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). State legislatures will make different policy choices about the appropriate length of sentences for crimes based on each legislature's views on the proper goals of punishment and on the local conditions. *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., concurring). Because state legislatures have the freedom to adopt different sentencing codes, "some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282.

Fourth, an Eighth Amendment review of a sentence "should be informed by 'objective factors to the maximum possible extent.' " *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." *Coker*, 433 U.S. at 592. "The most prominent objective factor is the type of punishment imposed." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring). For example, an objective line may be drawn between the death penalty and all other forms of punishment because it is uniquely irrevocable. *Id.*; *see Rummel*, 445 U.S. at 272 (citing *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J. concurring)).

In the noncapital punishment context, however, "we lack clear objective standards to distinguish between sentences for different terms of years." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). No "constitutional distinction" can be made "between one term of years and a shorter or longer term of years." *Rummel*, 445 U.S. at 275. "[T]he excessiveness of one prison term as compared to another is invariably a subjective determination." *Davis*, 454 U.S. at 373 (per curiam). Because courts have no objective standards with which to judge terms

of imprisonment, "'outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.'" *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 272) (emphasis added). Only those sentences that are "'grossly disproportionate'" to the crime violate the Eighth Amendment. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 288). A court should find that a sentence of a term of years is grossly disproportionate for a "severe" crime "only in the most extreme circumstance." *Harmelin*, 501 U.S. at 1006–07 (Kennedy, J., concurring).

A. The Majority Opinion Conflicts with *Harmelin* Because It Does Not Defer to the Arizona Legislature's Penological Judgments.

The majority did not apply the analysis set forth in *Harmelin*. Pet. App. A at 29, ¶ 74 (McGregor, J., dissenting). The majority paid *no* deference to the Arizona Legislature's penological judgment that sexual conduct with a minor is a very serious crime that warrants severe punishment. The Legislature's purpose in enacting the Dangerous Crimes Against Children Act was to "[p]rotect[] the children of Arizona and [to] punish[] severely those who prey upon them." *State v. Wagstaff*, 794 P.2d 118, 123–24 (Ariz. 1990). At the time that the Arizona Legislature considered enacting the statute, it received testimony and other evidence that children who are victims of sexual abuse suffer emotional, social, and physical harm–including the risk of contracting sexually-transmitted diseases–and that, while rapes against children had decreased, other sexual crimes against children had increased 18% from 1983 to 1984. Sexual Offenses; Child Victims: Hearings on S.B. 1021 Before the Comm. on Judiciary, 37th Leg., 1st Sess. 1–15 (Feb. 18, 1985). Based on this objective information, the Arizona Legislature could rationally have concluded that sexual crimes against children—including sexual conduct with a minor—were serious crimes warranting severe sentences. Such a conclusion comports with the Eighth Amendment. *See Ewing*, 538 U.S. at 28 ("It is enough" that California has "a reasonable basis" for believing that increasing

punishment for repetitive offenders advances the State's penological goals.).

Instead of respecting the Legislature's judgment, the majority relied on its *own* sense of the gravity of Davis's crimes:

> We recognize society's strong interest in protecting children and understand and appreciate that it is the legislature's province to assess the appropriate punishment for crimes against children. *But we cannot all say that all incidents of sexual conduct are of equal seriousness and pose the same threat to their victims or to society.*

Pet. App. A at 14, ¶ 37 (emphasis added). Instead of relying on objective information, as the Legislature did, the majority relied on *its* subjective perceptions of five factors that *it* deemed important.

First, the majority found important that the 13- and 14-year-old children consented to the sexual acts. *Id.* at 13–14, ¶ 36. But the Legislature decided that children of that age cannot consent and therefore did not provide consent as a defense to charges of sexual conduct with a minor except in narrowly prescribed circumstances that do not exist in Davis's case. *See* A.R.S. § 13–1407(B) (even though a minor has no capacity to consent, a defendant is not guilty of sexual conduct with a minor if the victim is at least 15 years old and the defendant could not reasonably have known the victim's age); A.R.S. § 13–1407(F) (a defendant is not guilty of sexual conduct with a minor if the victim consents to the conduct, is at least 15 years old, and the defendant is less than 19 years old or is attending high school and is no more than two years older than the victim). As Justice McGregor noted, "[d]etermining the age of consent requires that a line be drawn," and "unless the age selected by the legislature is irrational," the majority should not have redrawn the lines involving the age of consent. Pet. App. A at 36, ¶ 91 (McGregor, J., dissenting). By considering the children's consent, the majority rejected the Legislature's judgment without justification, contrary to this Court's decision in *Harmelin*.

Second, the majority found it important that Davis had no adult criminal record and had not committed any previous crimes against children. Pet. App. A at 13, ¶ 36. But the Legislature had already accounted for Davis's lack of prior convictions in the sentencing provisions of A.R.S. § 13–604.01. Because Davis had no prior convictions and the trial court found mitigating circumstances, he received the 13 years' imprisonment minimum sentence possible. A.R.S. §§ 13–604(C), –604(E). If Davis had a prior conviction for a dangerous crime against children, his minimum sentence would have been 23 years' imprisonment. *Id.* The majority's consideration of this factor, which the Legislature had already incorporated into its sentencing provisions and had given the weight that it deemed appropriate—usurped the Legislature's judgment.

Third, the majority found it important that sexual conduct among post-pubescent children is common. Pet. App. A at 13, ¶ 36. But the Legislature certainly was aware of this societal phenomenon when it enacted the Dangerous Crimes Against Children Act. *Id.* at 37, ¶ 94 (McGregor, J., dissenting). The Legislature either incorporated this information in determining the appropriate lengths of sentence to impose or found it irrelevant to the penological goals of protecting children and incapacitating criminals who prey upon them. As Justice McGregor recognized, children engaged in sexual conduct "are not engaged in harmless fun." *Id.* at 41, ¶ 103 n.19 (McGregor, J., dissenting). Early sexual activity is related to sexual victimization and poor physical health as an adult. *Id.* The majority's consideration of this factor was another rejection of the Legislature's judgment.

Fourth, the majority found it important that the record contained "evidence" that Davis's intelligence and maturity level "fell far below" that of a normal young adult, *Id.* at 13, ¶ 36, although neither the jury nor the trial court made any finding regarding Davis's intelligence or maturity, *id.* at 37, ¶ 95 (McGregor, J., dissenting). This factor is irrelevant to the Legislature's penological goals of protecting children and incapacitating criminals. Moreover, the Legislature has already accounted for the possibility that a defendant's lack of intelligence and maturity may make him less worthy of severe punishment by allowing

the trial court to mitigate the sentence. A.R.S. §§ 13–604.01(F), –702(D) (the presumptive sentence may be decreased by seven years if the defendant shows mitigating circumstances, including an impaired appreciation of the wrongfulness of his conduct). Reliance on this factor—already included in the Legislature's sentencing calculus —further indicates the majority's refusal to defer to the Legislature.

Fifth, the majority found it important that Davis's "benign boyfriend-girlfriend situation" should not be "caught up" in the "broad sweep" of the Dangerous Crimes Against Children Act. Pet. App. A at 13, ¶ 36. The majority's reliance on this factor shows even more than its reliance on the other factors that it merely disagreed with the Legislature about where the line of culpability and punishment should be drawn. The majority would rather have had the Legislature draw the culpability lines of the sexual conduct with a minor offense to exclude Davis's conduct because, in its view, the conduct was not seriously criminal:

> While recognizing that many sex crimes against children may well justify [a cumulative prison sentence of 52 years], others do not. We conclude that given the circumstances of Davis's sentences, the sentence imposed in this case appears to be grossly disproportionate to his crimes.

Id. at 14, ¶ 37.

But what conduct is deemed criminal and how much punishment that conduct warrants are policy questions that are within the democratic purview of the Legislature, not of the cloistered courts: "[O]ur tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding." *Ewing*, 538 U.S. at 24. "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 386, 393 (1958) (citation omitted). While the individual members of the majority may have preferred that the age limits of dangerous crimes against children and the defenses to the crimes be

drawn differently, Justice McGregor correctly recognized that the court must "generally leave to the legislature the task of drawing such lines, which must be placed somewhere if we regard dangerous crimes against children as deserving punishment more severe than crimes committed against adults." Pet. App. A at 38 ¶ 97 (McGregor, J., dissenting). The majority's reliance on its five factors to find that Davis's sentences were grossly disproportionate to his crimes directly conflicts with this Court's holding in *Harmelin* that an Eighth Amendment analysis must defer to the legislature's penological judgments about the gravity of crimes and the appropriate punishments for those crimes.

B. The Majority Opinion Conflicts with *Harmelin* Because It Applies Subjective, Not Objective, Factors.

The majority's reliance on its own factors to find Davis's sentences grossly disproportionate conflicts with *Harmelin* in yet another way: the factors are not objective, as *Harmelin* requires. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (Eighth Amendment analysis "should be informed by objective factors to the maximum possible extent"). The extent to which the majority's factors matter to the analysis depends entirely on the subjective perception of the justices in the majority in any given case. As this Court stated in *Coker*: "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." 433 U.S. at 592.

An appellate court composed of different individuals could examine the same factors that the majority found critical and come to diametrically opposed conclusions. One could conclude that the victims' consent was irrelevant because the harm from sexual conduct flows to the victim regardless of consent. One could conclude that a defendant's lack of a prior criminal record was unimportant where it was already considered in the sentencing statute and where, as in Davis's case, the defendant had committed multiple offenses on different occasions before he was apprehended. One could conclude that the prevalence of "post-pubescent" sexual activity was a reason to

hold defendants like Davis accountable for their actions. One could conclude that the Legislature's line-drawing decisions were too lenient, and could believe that the conduct of a defendant like Davis was serious and warranted severe punishment. Because such factors depend on an individual's subjective views, they cannot, consistent with *Harmelin*, be part of a principled analysis under the Eighth Amendment.

The same may be said of another consideration upon which the majority relied: the personal views of the jurors, the trial judge, the presentence report writer, and the victims' mothers. Pet. App. A at 14, ¶ 37. Those views are just as subjective as any judge's and cannot be used in any principled manner. Moreover, as Justice McGregor recognized, the collective judgment of the legislators determines what behavior is acceptable and what is reprehensible, not the opinions of the few individuals involved in this case. *Id.* at 43, ¶ 107 (McGregor, J., dissenting); *see also McCleskey*, 499 U.S. at 491.

Subjective factors cannot guide lower courts in applying the Eighth Amendment to sentences that come before them for review. Would the analysis change if the defendant was 19 years old and the victims 12 years old? What if the victims were pre-pubescent? Would it matter if the defendant sought out the victims instead of, as here, the victims seeking out the defendant? What if the victims' mothers cried for vengeance or the trial court or the jurors expressed harsher views toward the defendant? The majority's analysis provides no sure principles for lower courts to apply to determine whether a sentence imposed under the Dangerous Crimes Against Children Act violates the Eighth Amendment.

The majority's analysis of Davis's Eighth Amendment claim directly conflicts with the analysis that this Court set forth in *Harmelin*. Contrary to the principles identified in *Harmelin*, the majority defied the Arizona Legislature's penological judgment and substituted its own subjective sense of the gravity of the crime of sexual conduct with a minor and the appropriate punishment for that crime.

Although the majority's analysis is clearly contrary to *Harmelin*'s precepts, the "precise contours" of the proportionality principle inherent in the Eighth Amendment admittedly "are unclear." *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring). As this Court has observed, "[O]ur precedents in this area have not been a model of clarity." *Andrade*, 538 U.S. at 72. This lack of clarity derives from the divergent proportionality analyses that the Court applied in *Rummel* and *Solem*. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring); *see generally Ewing*, 538 U.S. at 20–25 (recounting this Court's recent Eighth Amendment jurisprudence). Although Justice Kennedy strove to reconcile the different analyses in *Harmelin*, this Court needs to provide further guidance. This Court has noted that in determining whether a term of years can violate the Eighth Amendment, the Court has "not established a clear or consistent path for courts to follow." *Andrade*, 538 U.S. at 72. This Court should grant certiorari to blaze a consistent path for the state and federal courts and hold that as long as a state legislature can reasonably find that the offense poses a sufficient threat to the individual and to society to warrant the punishment imposed, a sentence will not be grossly disproportionate under the Eighth Amendment.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

STATE of Arizona, Appellee,
v.
Anthony Charles DAVIS, Appellant.

No. CR-01-0423-PR.

Oct. 30, 2003.

Affirmed in part, vacated in part, and remanded.

McGregor, V.C.J., filed an opinion concurring in part and dissenting in part.

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James J. Haas, Maricopa County Public Defender, by Anna M. Unterberger, Deputy Public Defender, Phoenix, Attorneys for Appellant.

OPINION

BERCH, Justice.

¶ 1 We granted review in this case to decide whether sentencing a twenty-year-old defendant to a mandatory minimum sentence of fifty-two years without the possibility of parole for having voluntary sex with two post- pubescent teenage girls is so grossly disproportionate to the crime as to violate the Eighth Amendment's prohibition against cruel and unusual punishment. We hold that it is.

FACTS[1]

¶ 2 In January 1999, thirteen-year-old T.E. and her stepsister, C.M., snuck out of their house at night to meet nineteen-year-old Jason in a local park. Jason drove the girls to the home of Defendant Anthony Davis, where they met Davis and two other young men. The six young people socialized for some time. During the conversation, Davis told the girls that he was twenty, and T.E. said she was fourteen. Later that night, Davis and T.E. had sex. This was not T.E.'s first sexual encounter; she testified that she had first had sex when she was twelve years old, and she knew what Davis was doing.

¶ 3 T.E. and C.M. visited Davis at his house several more times that month, usually late at night. The second victim, P.T., accompanied the girls on January 20, 1999. During that visit, P.T. learned that Davis was twenty; she testified that "everyone knew" she was fourteen. Later that evening, Davis and P.T. had sex. They also had sex on two other occasions during the following two weeks.

¶ 4 Still later in January, Davis, Jason, and another young man visited P.T. and C.M. while P.T. was babysitting. The homeowners returned early, found the men there, ordered them to leave, and contacted the girls' parents.

¶ 5 After the babysitting incident, T.E. and C.M. ran away to Davis's house. P.T. went with them, but returned home the same evening. The next morning, February 1, the police found T.E. and C.M. at Davis's house with Davis and Jason.

¶ 6 When the police questioned her, T.E. denied having had sex with either Davis or Jason. The next day, however, T.E.'s mother called the

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1. We review the facts in the light most favorable to sustaining the verdict. *State v. Gallegos,* 178 Ariz. 1, 9, 870 P.2d 1097, 1105 (1994). In stating the facts, we have used initials to protect the identity of the minor victims.

police to tell them there had been sexual contact between T.E. and Davis. On February 3, P.T. and T.E. were examined by a doctor for signs of sexual abuse. The examining doctor found signs indicating that T.E. had had sexual intercourse within the week. In an interview with police on February 4, T.E. conceded that she had sex with Davis two or three times, the last time over the weekend of January 29-31.

¶ 7 The State charged Davis with four counts of sexual misconduct with a minor, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1405 (1997): count one with T.E. on January 18, 1999, count two with P.T. on January 20, 1999, count three with P.T. on January 25, 1999, and count four with P.T. on January 29, 1999. Each act was alleged as a dangerous crime against children. *See* A.R.S. § 13-604.01 (Supp.1998).

¶ 8 Throughout the case, Davis denied ever having sex with T.E., but admitted having sex with P.T. on three occasions. He claimed that P.T. initially told him she was eighteen, but told him she was sixteen the day after the babysitting incident. Davis testified that he did not have sex with P.T. after learning that she was only sixteen.

¶ 9 The jury convicted Davis on all four counts. Upon discovering that the minimum sentence that Davis could receive was fifty-two years, all twelve jurors submitted a note to the trial judge stating their belief that "the punishment for the crime is excessive." Two jurors submitted individual letters expressing their dismay and strong belief that the potential sentences for Davis were too harsh. The probation officer who prepared Davis's pre- sentence report acknowledged that while Davis should be held accountable for his crimes, the mandatory sentence was not warranted. The pre-sentence report also noted that neither T.E.'s mother nor P.T.'s mother wished to see Davis sentenced to a long prison term. Even the prosecutor recommended a mitigated prison sentence and agreed that Davis should be allowed to petition the Board of Executive Clemency for a commutation of his sentence.

¶ 10 The trial judge apparently agreed because he stated at sentencing that all of the charges were "legally non-dangerous and non-repetitive

offenses notwithstanding the nomenclature set forth in the charges." He also entered a special order allowing Davis to petition the Board of Executive Clemency for a commutation of sentence within ninety days of sentencing. *See* A.R.S. § 13- 603(L) (Supp.2002) (allowing such an order if the judge believes "that a sentence that the law requires the court to impose is clearly excessive"). Nonetheless, as required by statute, the trial judge sentenced Davis to fifty- two years in prison.

DISCUSSION

A. Proportionality of the Sentence to the Crimes Committed

¶ 11 Davis argues that given the circumstances of his offenses, the four flat, consecutive, thirteen-year sentences violate the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution and Article 2, Section 15 of the Arizona Constitution. He contends that the mandatory fifty-two-year sentence, without the possibility of parole, is so grossly disproportionate to his offenses as to be unconstitutional.

¶ 12 We asked the parties to brief whether Article 2, Section 15 of the Arizona Constitution provides greater protection against cruel and unusual punishment than does the Eighth Amendment to the United States Constitution. *See, e.g., People v. Bullock,* 440 Mich. 15, 485 N.W.2d 866, 872-74 (1992) (finding Michigan's "cruel or unusual" punishment provision broader than the United States Constitution's corollary provision). Although we do not follow federal precedent blindly, after considering the issue we do not find in this case a compelling reason to interpret Arizona's cruel and unusual punishment provision differently from the related provision in the federal constitution. *See State v. Noble,* 171 Ariz. 171, 173, 829 P.2d 1217, 1219 (1992).

1. *Proportionality Review.*

¶ 13 The Eighth Amendment to the United States Constitution and its corollary, Article 2, Section 15 of the Arizona Constitution, prohibit

punishments that are cruel and unusual. While originally reserved for review of corporal punishments, the Eighth Amendment has been applied to lengthy sentences of incarceration. *Lockyer v. Andrade,* 538 U.S. 63, ----, 123 S.Ct. 1166, 1173, 155 L.Ed.2d 144 (2003). We must decide whether Davis's fifty-two-year sentence is so excessively long as to be cruel and unusual.[2]

¶ 14 More than a decade ago, this court wrestled with the problem of a very long sentence in a case exhibiting facts remarkably similar to those at issue before us. *See State v. Bartlett,* 164 Ariz. 229, 792 P.2d 692 (1990) (*Bartlett I*). In *Bartlett I,* a twenty-three-year-old defendant was convicted of sexual conduct with two fourteen-year-old girls. *Id.* at 231, 792 P.2d at 694. Because both victims were younger than fifteen, the charges were considered dangerous crimes against children, although the girls considered themselves Bartlett's "girlfriends." *Id.* at 233, 792 P.2d at 696. Under the mandatory sentencing provisions of the Dangerous Crimes Against Children Act, Bartlett received the minimum sentence of forty years in prison without the possibility of early release. *Id.* As does Davis, Bartlett argued that his sentence was so disproportionate to his crimes that it violated the constitutional prohibition against cruel and unusual punishment. *Id.* Because the facts and circumstances of *Bartlett I* are so similar to those in the case at bar, we set forth in some detail our reasoning in that case.

¶ 15 In *Bartlett I,* we analyzed the constitutionality of the defendant's sentence under the prevailing test at the time, which had been enunciated by the United States Supreme Court in *Solem v. Helm,* 463 U.S. 277, 292, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983). *Solem* set forth a three-part test to determine whether a sentence was disproportionate to the crime and therefore violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*

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2. In section B of this opinion, we reverse one conviction. Because Davis was sentenced to fifty-two years and may be retried on the charge, we analyze gross disproportionality based on the sentence imposed. *See infra* ¶¶ 50-66.

The test required examination of the following factors: (a) the severity of the penalty as compared to the seriousness of the offense, (b) the jurisdiction's penalties for crimes that are more serious than the offense at issue (the intra-jurisdictional analysis), and (c) the sentences other jurisdictions impose for the same crime (the inter-jurisdictional analysis). *Id.*

¶ 16 In comparing the penalty with the offense, this court first examined the nature of the crime, including the type of harm threatened or inflicted, and the defendant's culpability. *Bartlett I,* 164 Ariz. at 234, 792 P.2d at 697. The court found several factors important: (a) the absence of either the threat or the commission of violence to induce the victims to engage in sex; (b) the victims' willing participation in the acts; (c) Bartlett's lack of a criminal record, including any crime against children; (d) his immaturity; (e) the sociological fact that "sexual conduct among post-pubescent teenagers is not uncommon"; and (f) the broad scope of the governing statute. *Id.* at 234-36, 792 P.2d at 697-99. While observing that the severe mandatory punishment required by the Dangerous Crimes Against Children Act may be justified for other, more heinous crimes, the court concluded that it was "not justified under the specific circumstances of this case." *Id.* at 236, 792 P.2d at 699.

¶ 17 Application of the second and third prongs of the *Solem* test, the intra- and inter-jurisdictional analyses, provided further support for that conclusion.

¶ 18 The intra-jurisdictional analysis showed that in Arizona, many more serious offenses qualified for equal or lesser punishments than the punishment Bartlett received. *Id.* For example, one guilty of second degree murder or forcible sexual assault of a minor could receive the same sentence Bartlett received. *Id.*

¶ 19 For the inter-jurisdictional analysis, the court conducted a nationwide survey to determine how other jurisdictions punished defendants guilty of two counts of sexual conduct with minors. *Id.* at 238-40, 792 P.2d at 701-03. The survey showed that three years was the

longest minimum sentence for the first offense, and in all but one state, ten years was the longest minimum sentence for the second offense. *Id.* at 238, 240, 792 P.2d at 701, 703. All sentences in all jurisdictions were far less than the forty years Bartlett was required to serve. Notably, the court did not find in any other jurisdiction "the particularly harsh combination of provisions present here, including both mandatory consecutive sentencing and nonavailability of parole." *Id.* at 240, 792 P.2d at 703.

¶ 20 In concluding its opinion, this court cautioned "that successful challenges to the proportionality of particular sentences are 'exceedingly rare.' " *Id.* (quoting *Solem,* 463 U.S. at 289-90, 103 S.Ct. at 3009). But in a narrow holding, carefully restricted to the facts of the case, the court determined that Bartlett presented that "exceedingly rare" case in which the application of the provisions of the Dangerous Crimes Against Children Act rendered the sentence unconstitutionally long. Accordingly, we remanded *Bartlett I* for resentencing without the application of the dangerous crimes against children enhancement. *Id.* at 242, 792 P.2d at 705.

¶ 21 On review by certiorari, the United States Supreme Court vacated the opinion in *Bartlett I* and remanded the case for reconsideration in light of its decision in *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). *Arizona v. Bartlett,* 501 U.S. 1246, 111 S.Ct. 2880, 115 L.Ed.2d 1046 (1991).

¶ 22 In *Harmelin,* a plurality of the Supreme Court recognized a "narrow proportionality" principle embodied in the Eighth Amendment that prohibits sentences that are "grossly disproportionate" to the crime. 501 U.S. at 997, 111 S.Ct. at 2702-03 (Kennedy, J., concurring, joined by O'Connor and Souter, JJ.). Justice Kennedy determined that the *Solem* three-part analysis remained useful, but a reviewing court should consider the second and third factors--that is, the intra- and inter-jurisdictional analyses--only if "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005, 111 S.Ct. at 2707.

¶ 23 The five opinions in *Harmelin* left unclear the contours of the test to be applied on remand in Bartlett's case. We concluded, however, that Justice Kennedy's modified *Solem* analysis provided the proper standard by which to reconsider the sentence in *Bartlett I. State v. Bartlett,* 171 Ariz. 302, 305, 830 P.2d 823, 826 (1992) (*Bartlett II*).

¶ 24 The modified *Solem* analysis required the court to first examine whether Bartlett's sentence was "grossly disproportionate to his crimes." *Id.* at 306, 830 P.2d at 827. Using the same factors we considered in *Bartlett I,* we again concluded that

> a sentence of forty years without possibility of parole for consensual sex with post-pubescent teenagers reaches the threshold of gross disproportion, given the fact that the people, through their legislature, have adopted statutes under which the courts impose comparable punishment by imprisonment for crimes such as violent rape, second degree murder, and brutal assault of children.
> *Id.* at 309, 830 P.2d at 830.

¶ 25 We validated our initial impression of gross disproportionality by conducting intra- and inter-jurisdictional analyses, which showed that little change had occurred in the two years that had passed since *Bartlett I* was decided. *Id.* at 310, 830 P.2d at 831. These analyses confirmed that Bartlett's sentence was grossly disproportionate to his crimes, both because it was harsher than sentences imposed in Arizona for more severe crimes and because it was far harsher than the minimum sentence imposed for a similar offense in any other jurisdiction. *Id.*

¶ 26 Two justices dissented in *Bartlett II,* 171 Ariz. at 311-16, 830 P.2d at 832-37. Although the dissenting justices concurred in the majority's assessment that Justice Kennedy's plurality opinion provided the proper framework for a proportionality review, they disagreed as to what that analysis entailed. *Id.* They believed, as does our dissenting colleague in this case, that the court was prohibited from reviewing the specific circumstances of Bartlett's crimes. *Id.* Rather, they reasoned, *Harmelin* permitted an analysis only of "the *threat posed to the*

individual and to society by the commission of that crime." *Id.* at 312, 830 P.2d at 833 (Corcoran, J., dissenting) (citing *Harmelin,* 501 U.S. at 1001-05, 111 S.Ct. at 2705-07).

¶ 27 Just four years later, the dissent's position became the majority. In *State v. DePiano,* 187 Ariz. 27, 926 P.2d 494 (1996), a three-member majority held that disproportionality must be measured by the nature of the crime and not by the facts and circumstances of any particular defendant's case. *Id.* at 30, 926 P.2d at 497.

¶ 28 In *DePiano,* the defendant attempted to commit suicide by carbon monoxide poisoning by running her car in her closed garage. *Id.* at 28-29, 926 P.2d at 495-96. She placed her two young sons in the car with her. *Id.* All survived, and DePiano was sentenced to two flat, consecutive, seventeen- year sentences for two counts of child abuse. *Id.* In affirming the convictions, this court rejected DePiano's disproportionality claim "without looking at the particular circumstances surrounding her offense." *Id.* at 30, 926 P.2d at 497.

¶ 29 As the divergent analyses in *Bartlett II* and *DePiano* show, this court has struggled to interpret the guidance from the Supreme Court. That Court has acknowledged that it has "not been a model of clarity" and has not "established a clear ... path for courts to follow." *Lockyer,* 538 U.S. at ----, 123 S.Ct. at 1173. Indeed, the Supreme Court has conceded that the only principle to emerge from its splintered Eighth Amendment jurisprudence is that a "gross disproportionality principle" does apply to non-capital cases. *Id.* Our task today is to decipher the Court's jurisprudence and determine the standards that govern a proportionality review. The proper application of those standards should resolve the point of divergence between *Bartlett II* and *DePiano:* whether a reviewing court conducting a proportionality review may examine the specific facts of the case or whether it may only view the crime generally.

¶ 30 We are aided in this task by the Supreme Court's recent decisions in *Lockyer* and *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), companion cases in which the Court attempted to

clarify the appropriate analysis for Eighth Amendment proportionality review. In each, the Court reviewed a lengthy sentence imposed under California's "three-strikes" law. *Lockyer,* 538 U.S. at ----, 123 S.Ct. at 1170; *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1182. Although the opinions in each case are sharply divided, a majority of the Court now appears to have adopted the analysis set forth in Justice Kennedy's plurality opinion in *Harmelin. See Ewing,* 538 U.S. at ----, 123 S.Ct. at 1187 (stating that "[t]he proportionality principles in our cases distilled in Justice Kennedy's concurrence [in *Harmelin*] guide our application of the Eighth Amendment" proportionality review); *see also id.* at ----, 123 S.Ct. at 1191-92 (Stevens, Souter, Ginsburg, and Breyer, JJ., dissenting, agreeing that a proportionality principle applies).

¶ 31 In conducting its analysis in each case, the Supreme Court reviewed the specific facts and circumstances of the offense that led to the imposition of the three-strike enhancement, as well as reviewing each defendant's prior record. *Lockyer,* 538 U.S. at ----, 123 S.Ct. at 1169-70; *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1189-90.[3] In *Ewing,* the specific facts of Ewing's crime revealed more than simply "shoplifting"; by stealing three golf clubs worth nearly $1200, he had committed grand theft. 538 U.S. at ----, 123 S.Ct. at 1189. Compounding the seriousness of the acts, Ewing committed his crime while on probation and "after previously having been convicted of at least two 'violent' or 'serious' felonies." *Id.* These individual circumstances, Justice O'Connor concluded, rendered Ewing's sentence "justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by [Ewing's] own long, serious criminal record." *Id.* at ----, 123 S.Ct. at 1190. Thus, in conducting its proportionality

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3. *Lockyer* was before the Court on federal *habeas corpus* review. 538 U.S. at ----, 123 S.Ct. at 1171. Because the Court was examining whether the state had failed to apply "clearly established federal law," the analysis in that case provides little guidance for our inquiry here, except insofar as the Court considered the defendant's specific facts and circumstances. We therefore do not further discuss the *Lockyer* opinion.

review, the Court examined the specific facts and circumstances of the defendant's crime.

¶ 32 Other courts have also reviewed individual circumstances when conducting proportionality reviews. *See Henderson v. Norris,* 258 F.3d 706, 709, 712 (8th Cir.2001) (reviewing the specific facts of the defendant's case, "the harm caused or threatened to the victim or to society and the culpability and degree of involvement of the defendant" in finding a sentence disproportionately long); *Hawkins v. Hargett,* 200 F.3d 1279, 1283 n. 2 (10th Cir.1999) (concluding that the defendant's culpability is relevant in Eighth Amendment proportionality review); *United States v. Harris,* 154 F.3d 1082, 1084 (9th Cir.1998) (considering, in upholding a ninety-five-year sentence, the facts of a bank robbery that was "undeniably violent[;] employees and bystanders were threatened and occasionally harmed"). These recent decisions demonstrate the utility and appropriateness of analyzing the specific facts and circumstances of the offenses when determining if a sentence is grossly disproportionate to the crime committed.

¶ 33 One other factor motivates us to review the specific circumstances of Davis's case: The legislature permits this court to reduce lengthy sentences when "the punishment imposed is greater than under the circumstances of the case ought to be inflicted." A.R.S. § 13-4037(B) (2001) (allowing imposition of "any legal sentence"). Although Davis's sentence fell within the legal sentencing range, if we find a sentence excessive, A.R.S. § 13-4037(B) imposes on us the duty to review the circumstances of the case to determine whether the sentence imposed is in fact unwarranted.

¶ 34 Our opinion in *DePiano,* which prohibited such an individualized analysis, while an understandable attempt to comply with the Supreme Court's splintered Eighth Amendment jurisprudence of the day, now appears to be a rivulet diverting from the mainstream analysis, and we overrule it.[4] Subsequent guidance from the Supreme Court suggests

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4. We do not lightly overrule a decision that is barely eight years
(continued...)

that, in assessing the constitutionality of a sentence, the reviewing court should examine the crime, and, if the sentence imposed is so severe that it appears grossly disproportionate to the offense, the court must carefully examine the facts of the case and the circumstances of the offender to see whether the sentence is cruel and unusual.

2. *Proportionality Review of Davis's Sentence.*

¶ 35 Against this background, we analyze the sentence imposed on Davis. We must first determine whether an inference of gross disproportionality between Davis's offenses and his sentence can be drawn.

a. Gross Disproportionality.

¶ 36 Davis was sentenced to serve fifty-two years in prison for having non-coerced sex with two post-pubescent teenage girls. This strikes the court--as it did the jurors, the trial judge, the pre-sentence report writer, and the girls' mothers--as an extraordinarily long sentence. Many of the factors deemed important in determining that Bartlett's sentence was disproportionate to his crimes are also present here: (1) Davis's sexual relations with the girls involved neither actual nor threatened violence; in each instance the girls knew what they were doing and willingly

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4. (...continued)
old. But stare decisis "is not 'an imprisonment of reason,' "*Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 618, 103 S.Ct. 3221, 3241, 77 L.Ed.2d 866 (1983) (Marshall, J., dissenting) (quoting *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 249, 75 S.Ct. 259, 266, 99 L.Ed. 290 (1955) (Frankfurter, J., dissenting)), or an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 446- 47, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), and when later opinions of the Supreme Court show our constitutional interpretations to be incorrect, we must overrule them and bring our decisions into conformity with Supreme Court precedent. *See* U.S. Const. art. VI, cl. 2 (supremacy clause).

participated. Indeed, the victims sought Davis out; all acts occurred after the victims went voluntarily to Davis's home. (2) Davis does not have an adult criminal record, nor has he committed any previous crimes against children. (3) Post-pubescent sexual conduct appears to be no less common today than it was in 1990.[5] (4) There is evidence in the record that Davis's intelligence and maturity level fell far below that of a normal young adult. (5) Like Bartlett, Davis was caught in the very broad sweep of the governing statute, which makes any sexual conduct with a person younger than fifteen years old by a person older than eighteen years old a "dangerous crime against children," whether the offense is a rape-incest by a step-parent who forces sex on a trusting ward or a pedophile who uncontrollably preys upon young children, *see State v. Taylor,* 160 Ariz. 415, 773 P.2d 974 (1989), or the more benign boyfriend-girlfriend situation in which one party is older than eighteen and the other younger than fifteen.

¶ 37 We recognize society's strong interest in protecting children and understand and appreciate that it is the legislature's province to assess the appropriate punishment for crimes against children. But we cannot say that all incidents of sexual conduct are of equal seriousness and pose the same threat to their victims or to society. The broad range of offenses encompassed by the statute under which Davis was charged, coupled with the legislature's command in A.R.S. § 13-4037(B) and the Supreme Court's Eighth Amendment jurisprudence, impose on us the

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5. A 1997 study conducted by the Center for Disease Control and Prevention showed that nearly 17% of eighth graders had previously engaged in sexual conduct, and of those, 46% had done so with three or more partners. J.V. Fetro, K.K. Coyle, P. Pham, *Health-Risk Behavior Among Middle School Students in a Large Majority-Minority School District,* 71(1) Journal of School Health 30-37 (2001). Another study found that 25% of fifteen-year-old females reported having had sex at least once. Elizabeth Terry and Jennifer Manlove, *Trends in Sexual Activity and Contraceptive Use Among Teens,* Child Trends Research Brief (2000), *available at* http://www.childtrends.org/onlinecart/product.cfm?id=628.

duty to apply the law to the specific facts of the cases that come before us to determine the constitutionality of sentences imposed. After conducting that review, we conclude that Davis's conduct was swept up in the broad statutory terms, which, in turn, triggered the mandatory sentences imposed. The trial judge, the jury, the pre-sentence report writer, and even the victims' mothers all recognized the injustice of sentencing Davis to a fifty-two-year prison sentence with no possibility of early release for the crimes at issue in this case. We cannot ignore that injustice. While recognizing that many sex crimes against children may well justify such a sentence, others do not. We conclude that given the circumstances of Davis's offenses, the sentence imposed in this case appears to be grossly disproportionate to his crimes.

b. Intra-jurisdictional Comparison.

¶ 38 Once an inference of gross disproportionality has been found, the Supreme Court suggests that a reviewing court validate that impression by conducting an intra- and inter-jurisdictional analysis.[6] *Harmelin,* 501 U.S. at 1005, 111 S.Ct. at 2707 (Kennedy, J., concurring); *Solem,* 463 U.S. at 291-92, 103 S.Ct. at 3010. In the intra-jurisdictional analysis, we compare the sentences imposed in Arizona for crimes more serious than those committed by Davis to see whether those sentences validate our tentative conclusion of gross disproportionality. *See Bartlett I,* 164 Ariz. at 242, 792 P.2d at 705.

¶ 39 Little has changed since this court conducted a similar analysis in 1990 in *Bartlett I. Id.* at 236-37, 792 P.2d at 699-700. It continues to be the case that those guilty of more serious crimes, such as second degree murder, sexual assault, or continued sexual abuse of a minor under fifteen years of age receive the same presumptive sentence that Davis did. *See* A.R.S. § 13-604.01(C). It also remains true that

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6. We recognize that the intra- and inter-jurisdictional analysis is not required. *See Dissent,* ¶102. But we agree with the Supreme Court's suggestion that such an inquiry might validate the court's initial impression of gross disproportionality.

dangerous crimes against children such as kidnapping, child abuse, aggravated assault, or commercial sexual exploitation of a child, all seemingly more dangerous crimes than Davis's, carry a lesser presumptive sentence and, with mitigation, those who commit such crimes are eligible for a ten-year minimum sentence for each count, less than the thirteen-year minimum sentence for each count for Davis's crime. A.R.S. § 13-604.01(D).

¶ 40 Additionally, other serious felony offenses not involving children receive significantly less severe sentences in Arizona. Those guilty of kidnapping a person older than fifteen, A.R.S. § 13-1304 (2001), sexual assault of a victim older than fifteen, A.R.S. § 13-1406 (2001), first degree burglary of a residential structure, A.R.S. § 13-1508 (2001), and arson of an occupied structure, A.R.S. § 13-1704 (2001), are all eligible for more lenient sentences, and the sentencing judge may order that multiple sentences be served concurrently. *See* A.R.S. § 13-708 (2001).

¶ 41 In response, the State cites five decisions affirming extremely harsh sentences imposed against those convicted of sex crimes against children. *Taylor,* 160 Ariz. at 422, 773 P.2d at 981 (eighty-five consecutive life sentences for a total of 2975 years for sexual exploitation and sexual conduct with minors); *State v. Jones,* 188 Ariz. 534, 937 P.2d 1182 (App.1996) (six consecutive twenty-five-year sentences for sexual assault); *State v. Hamilton,* 177 Ariz. 403, 868 P.2d 986 (App.1993) (three consecutive twenty-year sentences for child molestation); *State v. Ross,* 166 Ariz. 579, 804 P.2d 112 (App.1990) (twenty-five-year sentence for one count of sexual assault); *State v. Crego,* 154 Ariz. 278, 742 P.2d 289 (App.1987) (forty-year sentence for child molestation). The State argues that these cases show that Davis's sentences are not grossly disproportionate given the way other similar crimes have been punished in Arizona.

¶ 42 But even a cursory review of these five cases reveals enormous differences in the nature of the crimes, the harm to the victims and to society, and the culpability of the defendants. In *Jones,* the victim was the defendant's daughter, whom he raped and molested, coerced by threats of violence, for nearly ten years, from the time the child was five

years old until she turned fourteen. *Jones,* 188 Ariz. at 537, 539, 937 P.2d at 1185, 1187. The five known victims who were the subjects of the eighty-five counts on which Taylor was convicted ranged from three to eight years old, and many unknown victims were never located. *Taylor,* 160 Ariz. at 417, 423, 773 P.2d at 976, 982.[7] The defendant, who had three prior felonies involving sexual conduct with minors, had a large collection of photographs of the young victims engaged in various sex acts with each other and with him. *Id.* at 417, 422, 773 P.2d at 976, 981. In *Hamilton,* the victims were the defendant's girlfriend's twelve- and nine-year-old daughters, who had been subjected to years of sexual abuse and threats of violence when left in the defendant's care. *Hamilton,* 177 Ariz. at 405, 868 P.2d at 988. In *Ross,* the defendant and two other males abducted a fourteen-year-old girl whom they sexually assaulted. *Ross,* 166 Ariz. at 582, 804 P.2d at 115. Finally, the defendant in *Crego* was convicted of molesting two children under the age of fifteen only months after being released from prison for similar conduct. *Crego,* 154 Ariz. at 279-80, 742 P.2d at 290-91.

¶ 43 Thus, the facts of these cases stand in stark contrast to the facts of the case before us, in which the post-pubescent victims sought Davis out and willingly participated in the criminal acts.[8] Indeed, we draw

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7. Although a sentence of nearly 3000 years is extreme, it is the functional equivalent of a life sentence without the possibility of parole. 160 Ariz. at 423, 773 P.2d at 982. Such a sentence is not cruel and unusual given the facts of *Taylor. Id.*

8. We do not mean to blame the victims or to imply that they "asked for" what they got. *See* Dissent, ¶ 78. Nor do we mean to justify Davis's crimes. *See id.* We cite these facts to show that Davis did not threaten violence or use force to effectuate his crimes. But in analyzing the constitutionality of the sentence before us, we are required to assess "the sentence-triggering criminal conduct," which includes "the offender's actual behavior or other offense-related

(continued...)

two conclusions from the cases the State cites. First, Davis's fifty-two-year sentence is grossly disproportionate to his crimes when compared with the sentences imposed for the crimes described in the five cases cited by the State. Second, these cases vividly demonstrate why, when considering the proportionality of a sentence imposed, this court must look beyond the nomenclature of the crime charged and consider the facts of each particular case.

c. Inter-jurisdictional Comparison.

¶ 44 The inter-jurisdictional analysis requires comparison of punishments imposed for the same crime in other states. *Bartlett II,* 171 Ariz. at 310, 830 P.2d at 831. This court conducted such a comparison in *Bartlett I.* 164 Ariz. at 237-41 & nn. 4-5, 792 P.2d at 700-04 & nn. 4-5. What was true in 1990 when we decided *Bartlett I* remains true today; the sentence Davis received is much more severe than the minimum possible sentence a defendant could receive in any other state.[9] *See supra* ¶ 19.

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8. (...continued)
circumstances." *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1194 (Breyer, J., dissenting) (citing *Rummel v. Estelle,* 445 U.S. 263, 276, 100 S.Ct. 1133, 1140, 63 L.Ed.2d 382 (1980), and *Solem,* 463 U.S. at 290-303, 103 S.Ct. at 3010-16). These "offense- related circumstances" show that the Defendant did not threaten violence or use force to effectuate his crimes.

9. In applying this analysis from *Bartlett I* to Davis, we note that Bartlett was twenty-three when he committed his crimes, while Davis was only twenty. The dividing line for criminal responsibility in many states is twenty-one years of age. Because Davis was only twenty, he would receive more leniency in some states than Bartlett would have received. On the other hand, some states increase penalties for sexual conduct with one younger than fourteen. In *Bartlett,* both victims were fourteen. Davis was charged with one count of sexual conduct with T.E., who was thirteen. In jurisdictions that draw the line at fourteen,
(continued...)

¶ 45 The minimum sentence in Arizona for an offender who has no criminal history, but has been convicted of the offenses at issue here, is four thirteen-year sentences, which must run consecutively and for which there is no possibility of parole, for a total of fifty-two years. *See* A.R.S. § 13- 604.01. In no other state would a defendant in similar circumstances face a minimum possible sentence exceeding twenty years, and in the few states in which a twenty-year sentence is possible, the sentencing judge has the discretion to reduce the sentence. *E.g.*, R.I. Gen. Laws §§ 11-37-8.1 to - 8.2 (2002). In nearly all states, a defendant guilty of similar crimes could receive concurrent sentences totaling fewer than five years' imprisonment. *E.g.*, Cal.Penal Code §§ 261.5, 288(a) (West 1999), 1170 (West 1985 & Supp.2003), 1203 (West 1982 & Supp.2003), 3000 (West 2000 & Supp.2003) (setting the minimum sentence that could be imposed for Davis's offenses at three years, with the possibility of and eligibility for probation and parole); N.M. Stat. Ann. §§ 30-9-11(F) (Michie 1997 & Supp.2002), 31-18-15(A)(6), 31-18-15.1, 31-20-3, 31-20-5, 31-21-10 (Michie 2001) (providing for a sentence of eighteen months, probation- and parole-eligible).

¶ 46 In this case, the trial judge and the members of the jury thought Davis's sentence was "clearly excessive." The pre-sentence report recommended a sentence in the range of five years, a proposal with which the victims' mothers agreed. Even the prosecutor recommended that Davis be eligible to immediately apply for clemency. But the trial judge was statutorily bound to impose a flat fifty-two-year sentence. In no other state would a sentencing judge be required to impose such a severe sentence. Davis's sentence, therefore, fails the third prong of the gross disproportionality test.

d. Consecutive Sentences.

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9. (...continued)
Davis might have received a stiffer penalty than he would in jurisdictions that do not so distinguish, but still would not receive a sentence of fifty-two years in any other jurisdiction.

¶ 47 Although this court normally will not consider the imposition of consecutive sentences in a proportionality inquiry, this case cries out for departure from that general rule. *See Bartlett I,* 164 Ariz. at 239 n. 6, 792 P.2d at 702 n. 6. It is in part because judges in Arizona have no discretion regarding the minimum sentence and must impose consecutive sentences that this sentence fails the proportionality test.[10] *See* A.R.S. §§ 13-604.01(C) (requiring minimum sentence), 13-604.01(K) (requiring that sentences be served consecutively). Therefore, to ignore the requirement that the sentences be served consecutively would be to ignore one of the causes of the disproportionality. We recognize the legislature's right to impose a thirteen-year minimum sentence for dangerous crimes against children and to require that the sentences be served completely. We also recognize the legislature's right to require consecutive sentences for this type of offense. We cannot, however, uphold a sentence that becomes unconstitutionally disproportionate to the crimes committed because the sentences are mandatorily lengthy, flat, and consecutive.

¶ 48 Accordingly, while we recognize that Davis committed crimes worthy of severe punishment, we nonetheless find that the application of the mandatory sentencing provisions of the Dangerous Crimes Against Children Act creates an unconstitutionally disproportionate punishment in light of the specific facts and circumstances of Davis's offenses. We therefore vacate the sentences and remand this case to the trial court for resentencing for the offenses for which the convictions

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10. In *Lockyer* and *Ewing,* the Court considered important that the prosecutor had the discretion to charge the crimes as misdemeanors or felonies and, in both cases, had chosen to charge the crimes as felonies. *Lockyer,* 538 U.S. at ----, 123 S.Ct. at 1170; *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1183. Even after conviction, the trial judge could have declined to impose the sentence enhancement by defining the triggering offenses as misdemeanors rather than felonies. *Lockyer,* 538 U.S. at ----, 123 S.Ct. at 1170; *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1183. The trial judge had no such discretion in Davis's case.

are affirmed as class two felonies, non-dangerous, pursuant to A.R.S. §§ 13-702, 13-702.01 and 13-702.02.

¶ 49 Let us be clear that we do not find Davis's sentence disproportionate simply because it "seems too long." Nor are we merely substituting our judgment for the legislature's considered determination of the appropriate punishment for illegal sexual conduct with a minor. Sex forced on a minor by an adult may be a dangerous crime and the legislature may punish it as such. But we recognize that the Supreme Court has construed the Eighth Amendment to impose on a reviewing court the duty to examine a sentence claimed to be cruel and unusual in light of the specific facts and circumstances under which it is imposed. Having done so in this case, we abide by this court's determination that when a punishment is "so severe as to shock the conscience of society," it "violates the constitutional mandate." *State v. Davis (Randal),* 108 Ariz. 335, 337, 498 P.2d 202, 204 (1972). That Davis's fifty- two-year sentence shocks the societal conscience is apparent from the reactions of the trial judge, the jurors, and the victims' mothers. Accordingly, our conclusion that Davis's sentence violates the Eighth Amendment's prohibition against grossly disproportionate punishments is limited to the specific facts and circumstances in the record before us and is based on our determination that it is so disproportionate to the offenses that it shocks the moral sense of the court and community.

B. Lack of a Specific Offense Date in Counts One and Four

¶ 50 At trial, Davis objected to the instruction informing the jury that the prosecutor need not prove the exact date on which the offenses occurred, but that it was "sufficient if the evidence shows beyond a reasonable doubt that the crime was committed by the defendant on or about these dates charged in the indictment." Davis argues that the State's failure to specify a date for counts one and four impermissibly amended the indictments on those counts. This, he claims, resulted in a duplicitous charge, which created the possibility of a non-unanimous jury verdict as to count one and nullified his alibi defense on counts one

and four. We affirm Davis's conviction on count four, but reverse and remand for a new trial on count one.

1. *Count One.*

¶ 51 Count one charged Davis with having sex with T.E. "on or about the 18th day of January, 1999." At trial, T.E. testified that she had sex with Davis twice, once around the middle of January and once again during the weekend of January 29-31. The State presented the doctor who examined T.E. in early February. She testified that the examination revealed signs consistent with T.E. having had sexual intercourse "within the past week," which would have been the end of January. Although the prosecutor mentioned briefly in closing that the event charged occurred on the 18th, she also argued that the doctor's testimony supported a finding that the act occurred on Super Bowl weekend. Thus, the jury heard evidence that Davis had sex with T.E. on two separate occasions, occurring at least eleven days apart. The verdict form for count one, sexual conduct with T.E., did not specify the date of the offense.

¶ 52 Davis contends that because the trial judge informed the jury that the exact dates were not important, the verdict form for count one contained no date, and there was evidence that he had sex with T.E. on two separate occasions, count one effectively and impermissibly charged two crimes.[11] Some jurors might have concluded that he had

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11. The court of appeals found it "clear that the state presented evidence aimed at proving the first act of intercourse between T.E. and defendant." *State v. Davis,* 1 CA-CR 99-1028, slip op. at ¶ 25 (Ariz.App. Oct. 16, 2001) (mem.decision). The record shows, however, that the State also presented evidence and argued in closing that T.E. engaged in sexual conduct with Davis during the Super Bowl weekend. Specifically, T.E. testified that she engaged in sexual conduct on two occasions and the doctor testified that an early February exam showed that T.E. had engaged in sex one week before, around the end of January, during Super Bowl weekend.

sex with T.E. on January 18, while others, relying on the doctor's testimony, might have concluded that he had sex with her the weekend of January 29-31, but the jury was not unanimous on either date.

¶ 53 We agree with Davis that such a possibility existed.

a. Charging more than one act in Count One of the Indictment.

¶ 54 "[E]ach offense must be charged in a separate count" in an indictment or complaint. *State v. Whitney,* 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (citing Ariz. R.Crim. P. 13.3(a)). Charging more than one act in a single count is forbidden because it does not provide "adequate notice of the charge to be defended, ... present[s] a hazard of a non-unanimous jury verdict, and ... makes] a precise pleading of prior jeopardy impossible in the event of a later prosecution." *Id.* (citations omitted).

¶ 55 We considered an argument similar to the one Davis now makes in *Spencer v. Cocooning County Superior Court (State),* 136 Ariz. 608, 667 P.2d 1323 (1983). In *Spencer,* a father was charged with one count of incest and one count of molestation for a series of offenses occurring over the course of nearly four years. *Id.* at 609-10, 667 P.2d at 1324-25. We concluded that the defendant was put in jeopardy in the two counts charged "for any one of what could be one hundred separate criminal offenses." *Id.* at 611, 667 P.2d at 1326. Charging in this manner does not give a defendant "clear notice of the crime with which he is charged," and does not allow him to mount an adequate defense. *State v. Martin,* 139 Ariz. 466, 471, 679 P.2d 489, 494 (1984). Although the scale is smaller in Davis's case, the principle applies.

¶ 56 But the State asserts, and the court of appeals agreed, that *State v. Schroeder,* 167 Ariz. 47, 804 P.2d 776 (App.1990), disposes of Davis's claim. In *Schroeder,* the defendant was charged with only one count of sexual abuse, but the victim testified to seven distinct acts of fondling that occurred one evening. *Id.* at 51, 804 P.2d at 780. The defendant argued that the charge was duplicitous because it failed to specify the particular act on which the charge was based. *Id.*

¶ 57 The court in *Schroeder* held the charge not duplicitous because it determined the question to be simply one of credibility; "only if the jury unanimously accepted the victim's version of the events could they find defendant guilty of sexually abusing her." *Id.* at 53, 804 P.2d at 782.

¶ 58 The acts alleged by T.E., on the other hand, occurred eleven days apart, and, unlike the defendant in *Schroeder,* Davis offered more than one defense. Davis offered an alibi defense for the charge that he engaged in sexual conduct with the victims over the Super Bowl weekend and contended that he did not have sex with T.E. at all. He also attempted to show that T.E. could have engaged in sex with another person staying at his house during the Super Bowl weekend. Thus, the two distinct acts here differ from the evening's events in *Schroeder,* and call for a different conclusion.

¶ 59 We conclude that Davis's case is more like Spencer's. *Spencer,* 136 Ariz. at 611, 667 P.2d at 1326. We think it possible that some jurors may have believed Davis's alibi defense and convicted him for an offense on January 18, while other jurors may have convicted him for the Super Bowl weekend offense, based on the doctor's testimony that T.E. had engaged in sex within the preceding week. Because we cannot be certain which offense served as the predicate for the conviction, we conclude that the real possibility of a non-unanimous jury verdict exists.

¶ 60 The State contends, however, that the charge is not duplicitous because the date of the offense is not an element of the crime of sexual conduct with a minor. *See Jones,* 188 Ariz. at 543, 937 P.2d at 1191. While we agree with the general proposition, the case on which the State relies is inapposite to the point. In *Jones,* the evidence showed and the jury found the same number of sexual assaults as alleged in the indictment. *Id.* Here, Davis was convicted of one count, based on proof of two acts.

¶ 61 If the indictment, the evidence, the jury instructions, and jury forms reflect the same number of offenses, the State does not need to

prove the exact date of the offenses. When, however, "the evidence shows, or tends to show, that several acts of intercourse have occurred between defendant and prosecuting witness, it is incumbent upon the prosecution to elect which one of such acts it relies upon for a conviction." *Hash v. State,* 48 Ariz. 43, 50, 59 P.2d 305, 308 (1936). Failure to do so results in a duplicitous charge. That is what happened here, and the resulting risk that the jury returned a non-unanimous verdict constituted error.

b. Waiver.

¶ 62 The court of appeals found, and our review of the record confirms, that Davis did not object at trial to the jury form for count one. Failure to object at trial waives an error unless the error is fundamental. Ariz. R.Crim. P. 21.3(c); *State v. Gendron,* 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). The court of appeals concluded that the failure to specify the date on the form was not fundamental error.

¶ 63 While we agree that failure to object to a jury form will rarely result in reversal, that is not the gravamen of Davis's complaint. Davis complains that the verdict form allowed the jury to choose between two acts on which to convict him on count one, creating a duplicitous charge. Therefore, the heart of Davis's complaint regarding count one is not an incorrect jury form, but rather a duplicitous charge, which led to a non-unanimous jury verdict.

¶ 64 Article 2, Section 23 of the Arizona Constitution guarantees a defendant the right to a unanimous jury verdict in a criminal case. A violation of that right constitutes fundamental error. *State v. Woods,* 141 Ariz. 446, 456, 687 P.2d 1201, 1211 (1984); *see also State v. Counterman,* 8 Ariz.App. 526, 531, 448 P.2d 96, 101 (1968); *cf. United States v. Ullah,* 976 F.2d 509, 512 (9th Cir.1992) (stating that under federal law a unanimous jury verdict is nonwaivable).

¶ 65 In *Counterman,* a defendant who fired his weapon twice during a domestic dispute argued that the prosecution presented evidence of two separate assaults and had to elect which event supported the charge,

otherwise the charge would be duplicitous. 8 Ariz.App. at 530, 448 P.2d at 100. The court noted that a duplicitous charge creates the danger that the jury will not return a unanimous verdict and failure to do so is fundamental error. *Id.* at 531, 448 P.2d at 101; *see also Woods,* 141 Ariz. at 456, 687 P.2d at 1211. While in *Counterman* the court upheld the defendant's conviction because it determined that the series of events formed a single transaction, such is not the situation in Davis's case. The two acts that the State relied upon to support the charge involving T.E. occurred approximately eleven days apart and were not part of a single transaction.

¶ 66 Because the State offered evidence of more than one offense to support its first charge against Davis and the events were not part of a single transaction, we conclude that the charge was duplicitous. And because the jury determination may have been other than unanimous, we find the error fundamental. Accordingly, we vacate Davis's conviction as to count one and remand for a new trial. Because we vacate Davis's conviction for count one based on duplicity, we need not consider the effect of the jury instruction on his alibi defense for that count.

2. *Count Four.*

¶ 67 Count four charged Davis with having sex with P.T. "on or about January 29." At trial, the State attempted to prove that P.T. had sex with Davis on three separate occasions: January 20, 25, and 29 (counts two, three, and four). Davis presented an alibi for January 29, and thus asserted that he could not have committed the crime charged in count four. The trial court instructed the jury that the exact date was not an element of the offense and that the State need only prove that the crime was committed "on or about" the date alleged.

¶ 68 Davis argues that because the State was not required to prove the specific date for count four, he was effectively prevented from presenting an alibi defense. We disagree.

¶ 69 Davis testified that he worked all day on January 29, adding that he spent the night in his truck at the job site. Davis's boss confirmed that Davis worked at the job site that day. Davis's trial counsel argued in closing that Davis was not at home on January 29 and thus could not have committed the crime on the 29th. The trial judge gave an alibi instruction before the jury began its deliberations. Thus, Davis presented evidence of an alibi, his counsel argued the alibi defense in closing, and the trial judge instructed the jury regarding the alibi defense. The jury simply did not believe the defense.

¶ 70 A defendant's mere assertion of an alibi defense "cannot compel the state to elect an exact day." *State v. Simmering,* 89 Ariz. 261, 264, 361 P.2d 4, 6 (1961). In *State v. Verdugo,* for example, the defendant was charged with two counts of rape occurring "on or about the month of August." 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973). The defendant put forth an alibi defense, offering evidence that he was out of town during the summer and fall of that year and presenting witnesses who testified that he worked with them in Nashville, Tennessee until "Halloween" that year. *Id.* This court concluded that the defendant was not deprived of his alibi defense; rather, the jury "apparently failed to believe" his defense. *Id.*

¶ 71 In this case, the State presented evidence that count four occurred on January 29, but it also presented evidence that the offense occurred sometime during that weekend. The jury heard from P.T. that she could not remember the exact dates of her sexual encounters with Davis, but she narrowed the date of the third encounter to Super Bowl weekend, which included January 29. Perhaps most damaging to Davis's defense was his own admission that he had sex with P.T. on three separate occasions in January. Thus, the jury either rejected Davis's alibi defense outright or concluded that, although he may have been at work on the 29th, he nevertheless had a sexual encounter with P.T. "on or about" January 29th. In either circumstance, there was sufficient evidence to support the conviction on count four of the indictment.

CONCLUSION

¶ 72 We vacate Davis's conviction as to count one, affirm all other convictions, vacate the sentences imposed, and remand the case to the superior court for retrial and sentencing pursuant to A.R.S. §§ 13-702, 13-702.01 and 13-702.02.

CONCURRING: CHARLES E. JONES, Chief Justice and NANETTE M. WARNER, Judge.*

> FN* Due to the vacancy created by the retirement of Justice THOMAS A. ZLAKET, the Honorable NANETTE M. WARNER, Judge of the Pima County Superior Court, was designated to sit with the court and participate until the final disposition of this matter. Ariz. Const. art. 6, §§ 3, 20; A.R.S. § 38-813 (2001).

NOTE: Justice STANLEY G. FELDMAN sat for oral argument but retired before the filing of the opinion and therefore did not participate in the opinion.

McGREGOR, Vice Chief Justice, concurring in part and dissenting in part:

¶ 73 I agree with much of the majority opinion. I agree that Davis received a very long sentence following his conviction of four counts of sexual misconduct with a minor, based upon four instances of sexual intercourse with girls under fifteen years of age. Op. ¶ 36. I agree that the United States Supreme Court has now made clear, through its decision in *Ewing v. California,* 538 U.S. 11, ----, 123 S.Ct. 1179, 1187, 155 L.Ed.2d 108 (2003), that in deciding whether a sentence is so grossly disproportionate as to violate the Eighth Amendment, we should apply the approach first announced in Justice Kennedy's concurring opinion in *Harmelin v. Michigan,* 501 U.S. 957, 996-1001, 111 S.Ct. 2680, 2702-05, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring). Op. ¶ 30. I also agree that applying the *Harmelin* principles allows us to consider the facts of the crime involved. Op. ¶ 31.

¶ 74 For several reasons, I dissent from the majority's holding that the Eighth Amendment prohibits the sentence imposed in this case. First, the majority interprets *Harmelin* too broadly and bases its proportionality analysis not only upon the facts of the crime but also upon its view of the relative culpability of the defendant and relative blameworthiness of the victims. Second, while the majority states that it will apply the proportionality principles of *Harmelin,* the opinion instead relies upon the approach defined in *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), an approach that produces a result different from that reached under the *Harmelin* analysis. Finally, the majority relies upon factors that, in my view, should not apply to and do not further an Eighth Amendment analysis.

I.

¶ 75 My first point of departure from the majority involves its decision to conduct its proportionality analysis by considering not only the facts of Davis's crimes but also its subjective characterization of the actions of the victims and the defendant. In *Ewing v. California,* the Supreme Court considered whether the Eighth Amendment prohibits imposing a life sentence under California's recidivist statute, commonly referred to as the "three strikes and you're out" law. 538 U.S. at ----, 123 S.Ct. at 1182. As the majority notes, the *Ewing* Court discussed the nature of the offenses of which Ewing had been convicted prior to engaging in its proportionality review. *Id.* at ----, 123 S.Ct. at 1189-90. The Court had followed a similar practice in earlier Eighth Amendment proportionality decisions.[12] In those decisions, the Court described, although it seemed not to attach great importance to, the crimes committed by the defendants. In this case, adopting that practice would

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12. *See, e.g., Harmelin,* 501 U.S. at 961, 111 S.Ct. at 2684; *Solem,* 463 U.S. at 279-84, 103 S.Ct. at 3004-06; *Hutto v. Davis,* 454 U.S. 370, 370-72, 102 S.Ct. 703, 703-04, 70 L.Ed.2d 556 (1982) (per curiam); *Rummel v. Estelle,* 445 U.S. 263, 264-68, 100 S.Ct. 1133, 1134- 36 (1980).

justify our considering more than the language of the statutes under which the jury convicted Davis. That is, we can take into account not simply that this case involves an adult charged with four counts of sexual misconduct with two minors, but also that the jury convicted Davis, a twenty-year-old man, of four counts of sexual misconduct, occurring on four separate occasions, and involving two girls, aged thirteen and fourteen.

¶ 76 The majority, however, takes a far more expansive view of the nature of the offenses and also considers the relative culpability of Davis and of the victims. That approach leads to the most disquieting feature of the majority opinion.

¶ 77 The majority finds significant the victims' prior sexual history and their "consent" to sexual misconduct by Davis. The opinion discusses, for instance, the fact that T.E. had engaged in sexual activity when she was twelve years old.[13] Op. ¶ 2. The majority also finds it important to note that the victims "sought Davis out," Op. ¶¶ 36, 43, that the victims "knew what they were doing," Op. ¶ 36, and that they "willingly participated" in the sexual conduct. Op. ¶¶ 36, 43.

¶ 78 I thought we long ago had put aside any approach that blames victims for sexual crimes. The notion that a young victim "asks for it" or deserves to become the victim of sexual misconduct because he or she does not object to the sexual activity must be discarded. Our laws permit no justification defense that relies upon the argument that a young victim seduced his or her violator or consented to the violation, and this court should not suggest that such a justification plays any role in evaluating the culpability of a defendant.

¶ 79 The majority's decision to examine the personal culpability of the defendant also leads it into a fact-finding role for which this court is not

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13. For some reason, the majority does not comment upon P.T.'s sexual history, although three of the counts of which Davis was convicted involved her.

suited. The majority states that "[t]here is evidence in the record that Davis's intelligence and maturity level fell far below that of a normal young adult." Op. ¶ 36. That finding does not inhere in the jury's verdict, and we have no finding from the trial judge or the jury that this statement accurately describes Davis. We should not base constitutional analysis upon factual findings made by this court while acting in its capacity as an appellate court.

¶ 80 Although this court should not engage in characterizing the relative culpability of Davis and the victims, our justice system does provide a method for undertaking the type of analysis engaged in today by the court. If a trial judge concludes that a sentence required by law is clearly excessive, the judge can enter a special order allowing the defendant to petition the board of executive clemency (the Board) for a commutation of sentence within ninety days after a defendant is committed to custody. Arizona Revised Statutes (A.R.S.) § 13-603.L (Supp.2002). The trial judge followed that procedure in this matter. Op. ¶ 10. If the Board finds by clear and convincing evidence that the sentence is clearly excessive and that a substantial probability exists that the offender will conform to the law, the Board can recommend that the governor commute the sentence. A.R.S. § 31-402.C.2 (2001). The Board makes its findings, however, only after holding a hearing at which the victim, county attorney, and presiding judge receive a chance to be heard. *Id.* Rather than rely on that existing procedure, the majority today, without the benefit of a hearing, simply substitutes its judgment for that which the Board might make.

¶ 81 The majority's decision to consider the relative culpability and blameworthiness of the defendant and the victims as part of an Eighth Amendment proportionality analysis suffers from another shortcoming: It inserts considerable subjectivity into the court's analysis. The Supreme Court has instructed that the Eighth Amendment proportionality analysis should rely upon objective factors. *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1186 (citing *Harmelin,* 501 U.S. at 1001, 111 S.Ct. at 2705). The majority's approach makes following that direction impossible. Would the outcome today differ if the court regarded the defendant as more mature or if the defendant had been twenty-two

rather than twenty years of age or if at least one of the victims had not revealed prior sexual activity? Such subjectivity, it seems to me, has no place in the constitutional analysis this case requires the court to make.

II.

¶ 82 The majority concludes, and I agree, that we should apply the principles of *Harmelin* in conducting an Eighth Amendment proportionality analysis. Op. ¶ 30. Rather than analyze this case under the *Harmelin* principles, however, the majority actually applies the analysis used in *Solem v. Helm,* as interpreted by this court in *State v. Bartlett,* 171 Ariz. 302, 830 P.2d 823 (1992) (*Bartlett II*), and *State v. Bartlett,* 164 Ariz. 229, 792 P.2d 692 (1990) (*Bartlett I*). That approach skews and affects the outcome of the analysis.

¶ 83 In *Ewing v. California,* the Court announced that the "proportionality principles in our cases distilled in Justice Kennedys concurrence [in *Harmelin*] guide our application of the Eighth Amendment...." 538 U.S. at ----, 123 S.Ct. at 1187. The Court recognized four principles of proportionality review identified by Justice Kennedy in *Harmelin:*

> "[T]he primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors"--that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Justice Kennedy's concurrence [in *Harmelin*] also stated that *Solem* "did not mandate" comparative analysis "within and between jurisdictions."

Id. at ----, 123 S.Ct. at 1186-87 (quoting *Harmelin,* 501 U.S. at 1001, 1004-05, 111 S.Ct. at 2705, 2707).

¶ 84 In applying the *Harmelin/Ewing* analysis, we must be mindful that the Eighth Amendment contains only a "narrow proportionality principle" that "applies to noncapital sentences." *Harmelin,* 501 U.S.

at 996-97, 111 S.Ct. at 2702-03. "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle,* 445 U.S. 263, 272, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980). To demonstrate the extremely narrow parameters of the proportionality principle in noncapital cases, the Supreme Court has explained that the principle would "come into play in the extreme example ... if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274 n. 11, 100 S.Ct. at 1139 n. 11. This case does not fit within the narrow scope of the proportionality principle that the court purports to apply.

A.

¶ 85 Under the *Harmelin/Ewing* analysis, we should first consider the primacy of the legislature and focus our analysis upon the public policy judgments made by the legislature when it enacted the Dangerous Crimes Against Children Act (the Act), which includes A.R.S. section 13-604.01, the sentencing statute at issue here.[14]

¶ 86 We have previously considered the legislature's intent in adopting the enhanced penalties of section 13-604.01:

> The legislature's purpose in enacting the Dangerous Crimes Against Children Act can be surmised. Protecting the children of Arizona and punishing severely those who prey upon them certainly are two legislative goals. In addition ... the legislature is attempting to address the problem of recidivism alleged to exist in this category of offender.

State v. Wagstaff, 164 Ariz. 485, 490-91, 794 P.2d 118, 123-24 (1990). The language of section 13-604.01 reflects the legislature's decision to protect, punish, and deter.

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14. For a comprehensive description of the various provisions adopted as part of the Dangerous Crimes Against Children Act, see *State v. Williams,* 175 Ariz. 98, 854 P.2d 131 (1993).

¶ 87 Rather than defer to the legislature's public policy choices reflected in the Act, the majority identifies five factors it deems important in concluding that Davis's sentence, although required by the clear language of the Act, was grossly disproportionate to the crimes he committed. I find none of the majority's justifications for departing from the statutory language persuasive.

¶ 88 The majority first concludes that the crimes "involved neither actual nor threatened violence" because the victims consented to the sexual acts, noting that the girls "willingly participated." Op. ¶ 36. In other words, the crimes involved "non-coerced sex with two post-pubescent teenage girls." *Id.* But the legislature has already made the policy decision that children under the age of fifteen cannot give consent to sexual intercourse.[15]

¶ 89 Our society and legal system recognize that, when a child falls below a particular age, that child lacks capacity to consent to harmful acts committed against the child. Because children cannot protect themselves, society and the law assume responsibility for protecting children in those instances in which a child's lack of capacity prevents him or her from giving consent:

> The state has a recognized interest in the welfare of its citizens who, by reason of age or physical or mental disability, cannot care for themselves. So it is with children of tender years. The conclusive presumption that children less than sixteen years of age are unable to consent to sex acts is but a further extension of the protective arm of government which is universally followed.

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15. Under A.R.S. section 13-1407, an accused can defend a charge under section 13-1405, the statute under which the jury convicted Davis, by asserting his lack of knowledge of the victim's age *if* the victim's lack of consent is based on incapacity to consent *and* the victim is fifteen, sixteen or seventeen years of age. A.R.S. § 13-1407.B (2001). The legislature expressly excluded this defendant from being able to argue that these victims could actually consent to his actions.

Payne v. Commonwealth, 623 S.W.2d 867, 875 (Ky.1981); *see also* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason,* 22 Seton Hall Legis. J. 1, 33-34 (1997) (noting that protecting children is one of the most consistently expressed reasons for prohibiting sexual conduct with children).

¶ 90 We do not enforce contracts entered into by children because they lack capacity to consent, *Worman Motor Co. v. Hill,* 54 Ariz. 227, 231, 94 P.2d 865, 866 (1939), and we surely must not place responsibility for determining whether a child should engage in sexual activity with an adult upon the child. Yet the majority adopts just such a view today and makes the victims of these crimes at least partially responsible because they "willingly participated."

¶ 91 Determining the age of consent requires that a line be drawn. Presumably all would agree that a ten-year-old child could not consent to sexual relations, no matter what words the child used to express consent, and even if he or she had become sexually active at eight years of age. The majority may disagree with the placement of the line drawn for consent by the legislature, but unless the age selected by the legislature is irrational, this court should not engage in re-drawing the lines involving age of consent.[16]

¶ 92 Nor can we take comfort from the fact that these victims were "post- pubescent," another fact afforded significance in the majority opinion. Op. ¶¶ 36, 43. The age of consent involves mental, not

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16. The statutes defining sexual offenses against children frequently involve distinctions based on age. *See, e.g.,* A.R.S. § 13- 1405.B (2001) (class of felony depends upon whether victim is under fifteen years of age); A.R.S. § 13-1407.F (2001) (defense to prosecution if victim fifteen, sixteen or seventeen and defendant less than nineteen or attending high school and no more than twenty-four months older than victim and conduct is consensual); A.R.S. § 13-1410.A (2001) (child molestation involves sexual contact with child under fifteen years of age).

physical, maturity. A profoundly retarded adult could not consent to sexual relations, regardless of his or her physical maturity. A.R.S. § 13-1401.5(b) (2001) ("without consent" includes victim incapable of consent by reason of mental disorder or mental defect). Whether these children were pre- or post-pubescent, therefore, does not affect their capacity to consent.

¶ 93 The majority then observes that Davis "does not have an adult criminal record, nor has he committed any previous crimes against children." Op. ¶ 36. The record supports that statement, although Davis, of course, did commit more than one crime against children; the jury convicted him of four crimes against children.

¶ 94 The majority also finds support for its holding by observing that post- pubescent sexual conduct appears no less common today than it was in 1990, the year we decided *Bartlett I.* I do not doubt that the majority's statement is accurate, but the legislature also presumably knew of "post-pubescent sexual conduct" when it adopted the Act and imposed harsher punishment for those who engage in sexual misconduct with children under the age of fifteen.

¶ 95 The majority further states that "[t]here is evidence in the record that Davis's intelligence and maturity level fell far below that of a normal young adult." Op. ¶ 36. As previously mentioned, this factor relies upon fact- finding undertaken by this court, without the benefit of a hearing, and provides no reliable basis for conducting a proportionality review under the Eighth Amendment.

¶ 96 The next factor considered in the majority's proportionality review involves its conclusion that "Davis was caught in the very broad sweep of the governing statute, which makes any sexual conduct with a person younger than fifteen years old by a person older than eighteen years old a 'dangerous crime against children....' " *Id.* The statute, by its terms, generally operates precisely as described.[17] We previously have

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17. FN17. The legislature has recognized some exceptions to the
(continued...)

recognized, however, that the legislature used broad language *because it intended* that an adult who targets a child "assumes the risk that the victim will turn out to be within a protected age group." *State v. Williams,* 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993). If the court regards the statute as applying to conduct that the state cannot regulate, we should overturn the statute because it is overbroad. *See Purcell v. Super. Ct.,* 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975) (finding that a statute that applies to conduct the state cannot regulate is overbroad). Absent such a determination, we should apply the statute as written to further the legislature's intent in adopting the Act.

¶ 97 The majority might prefer that different ages apply, both for defendants and victims, Op. ¶ 44 n. 9, and the Arizona Legislature certainly could have selected older or younger ages. Another legislature might well conclude that sexual conduct with a fourteen-year-old child is not a dangerous crime against children unless the adult is twenty-one or twenty-five or thirty years old, or unless the victim is less than fourteen, or less than thirteen, or less than twelve years of age. But we generally leave to the legislature the task of drawing such lines, which must be placed somewhere if we regard dangerous crimes against children as deserving punishment more severe than crimes committed against adults.

¶ 98 We should not conduct a proportionality review without giving full consideration to the policies underlying a challenged sentencing scheme. In *Ewing v. California,* the Court concluded: "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making

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17. (...continued)
general language of the statute. For instance, A.R.S. section 13-1407.F allows a defendant to assert, as a defense to prosecution, that he is less than nineteen or attending high school and that the victim is between fifteen and seventeen and consented to the sexual conduct. The majority seeks to add further exceptions to the language of the statute.

that choice." *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1187. In adopting the Dangerous Crimes Against Children Act, the Arizona Legislature made a judgment that public safety requires severe punishment of adults who engage in sexual conduct with children under the age of fifteen. Our laws have long granted special protection to children, and I do not think the Eighth Amendment prohibits the state from choosing to afford extra protection to children under the age of fifteen when they become victims of sexual misconduct by adults. Although the Act required the trial judge to impose very long sentences in this instance, I would find no gross disproportionality between the crimes and the sentences.

B.

¶ 99 The second principle of proportionality review defined by *Harmelin/ Ewing,* which the majority does not address, directs us to consider the variety of legitimate penological schemes that a legislature may choose to adopt. This court has recognized that, in adopting the Act, the legislature intended to protect children, to punish severely those who prey upon children, and to address the problem of recidivism alleged to exist in this class of offender. *Wagstaff,* 164 Ariz. at 490-91, 794 P.2d at 123-24. Protection, punishment, and deterrence constitute appropriate penological schemes. Applying this factor of the *Harmelin/Ewing* proportionality review, then, also indicates that this case does not fall within the narrow range of those sentences that offend the Eighth Amendment.

C.

¶ 100 The final *Harmelin/Ewing* principle applicable here[18] requires that "proportionality review be guided by objective factors." *Ewing*, 538 U.S. at ----, 123 S.Ct. at 1186. I cannot discern the objective factors applied by the majority. Rather than consider objective factors, the majority has elected to base its decision upon factors other than those the legislature emphasized in adopting the Act. I am uncertain how to apply the approach adopted today, which echoes that of *Bartlett I* and *Bartlett II*, except to conclude that when an adult under some undefined age engages in sexual conduct with a child above some undefined age, we will find the sentences required by Arizona law grossly disproportionate to the crimes committed, particularly if the victim is post-pubescent and admits to some sexual experience. Those factors do not, in my view, provide the sort of objective analysis envisioned by *Harmelin/Ewing*.

¶ 101 The majority opinion implicitly recognizes the lack of standards developed for a proportionality analysis by limiting its decision "to the specific facts and circumstances in the record before us," Op. ¶ 49, the same approach taken in *Bartlett I* and *Bartlett II*. *Bartlett II*, 171 Ariz. at 308-09, 830 P.2d at 829-30 ("As we said before ... '[a]lthough such a harsh penalty may be justified in the context of other, more heinous crimes ... it is not justified under the specific circumstances of this case.' " (quoting *Bartlett I*, 164 Ariz. at 236, 792 P.2d at 699)); *Bartlett I*, 164 Ariz. at 241, 792 P.2d at 704 ("In this case, however, we hold that the statutory range of sentencing ... cannot constitutionally be applied to defendant's crimes under the facts and circumstances of this case."). The state, defendants, victims and trial courts should be able to rely upon clear principles of analysis that apply to all cases, rather than being required to consider the specific facts of each case without

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18. The third principle of proportionality review involves the nature of the federal system. *Ewing*, 538 U.S. at ----, 123 S.Ct. at 1186. That factor does not apply to our analysis of state legislation, although we should afford the same deference to legislative decisions involving sentencing schemes as do the federal courts.

discernible guidelines. The principles of proportionality review set out in *Harmelin/Ewing* provide such guidelines, and I would follow them.

III.

¶ 102 Although *Harmelin/Ewing* does not mandate a comparative analysis within and between jurisdictions, the majority devotes much of its opinion to engaging in just such an analysis. Op. ¶¶ 38-43. I disagree with the premise underlying that analysis.

¶ 103 The majority's intra-jurisdictional comparison relies upon the premise that those convicted of "crimes more serious" receive the same or a lesser presumptive sentence when compared with that given Davis. Op. ¶ 38. But that conclusion assumes the question. The legislature has determined that sexual conduct with children unable to give consent *is* a very serious crime. The majority may regard kidnapping of a person older than fifteen, first degree burglary of a residential structure, or arson of an occupied structure as more serious than sexual conduct with a minor, Op. ¶ 40, but the legislature did not. Although the majority assumes that the harm to society and victims for the crimes involved here is relatively slight, the legislature could, and did, decide otherwise.[19]

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19. Children involved in sexual conduct are not engaged in harmless fun. Numerous studies point to serious difficulties that result from such activity. For instance, one study found that the frequency of sexual activity during adolescence is related to coerced sex, or sexual victimization, later in life. Janine M. Zweig et al., *Adolescent Risk Factors for Sexual Victimization: A Longitudinal Analysis of Rural Women,* 17 J. Adolescent Res. 586, 595-96 (Nov.2002). Another study found that adolescents who initiate health-risk behaviors such as sexual intercourse at an early age frequently experience poorer health later in life, lower educational attainment, and less economic productivity than their peers. Kathleen Mullan Harris et al., *Evaluating the Role of "Nothing to Lose" Attitudes on Risky Behavior in Adolescence,* 80 Soc. Forces 1005, 1008 (Mar.2002).

(continued...)

¶ 104 After considering other decisions that upheld extremely harsh sentences for those convicted of dangerous crimes against children,[20] Op. ¶¶ 41- 42, the majority concludes that those decisions involve "enormous differences in the nature of the crimes, the harm to the victims and to society, and the culpability of the defendants." Op. ¶ 42. In reaching that conclusion, the majority again relies upon the notion that these "post- pubescent victims sought Davis out and willingly participated in the criminal acts." Op. ¶ 43. That statement troubles me on several levels. First, nothing these victims did constituted a criminal act; only Davis committed criminal acts. Second, once again the statement imposes responsibility for an adult's actions upon victims too young to give consent. Much younger children also "consent" to predatory acts. I am uncertain just where this line of analysis leads us, and I am unwilling to conclude, without the benefit of generally applicable principles, that particular crimes do not merit the punishment selected by the legislature.

IV.

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19. (...continued)

20. Because Arizona has adopted harsh sentencing laws, many other examples of extremely long sentences exist, both in cases involving crimes against children and in cases involving other crimes. *See, e.g., State v. Jonas,* 164 Ariz. 242, 792 P.2d 705 (1990) (forty-six years for trafficking in stolen property and sale of one marijuana cigarette to a minor under fifteen); *State v. Hummer,* 184 Ariz. 603, 911 P.2d 609 (App.1995) (three consecutive life sentences and three concurrent twelve- year sentences for convictions of two counts of sexual conduct with a minor, three counts of furnishing obscene materials to a minor, and one count of molestation of a minor, with two prior felony convictions); *State v. Freeland,* 176 Ariz. 544, 863 P.2d 263 (App.1993) (life without possibility of parole for twenty-five years for aggravated assault while on probation); *State v. Jobe,* 157 Ariz. 328, 757 P.2d 604 (App.1988) (fifty-five years for two counts of child molestation).

¶ 105 In addition to disagreeing with the majority's failure to apply the *Harmelin/Ewing* principles, I cannot agree with several other conclusions reached in the majority opinion.

¶ 106 First, while recognizing that we usually do not consider the imposition of consecutive sentences as part of a proportionality review, the majority finds reason to depart from our general rule. Op. ¶ 47. Although the majority does not make its conclusion explicit, I gather that the majority does not regard a sentence of thirteen years as grossly disproportionate to the crime of sexual misconduct with a child. That is, the majority would not reach the conclusion that the sentences required by law for Davis violate the Eighth Amendment if Davis could have served the sentences concurrently. If that is so, then today's analysis should focus upon A.R.S. section 13-604.01.K, which requires consecutive sentences, rather than upon section 13-604.01.C. An analysis of section 13-604.01.K would require that we consider the legislature's reasons for requiring consecutive sentences rather than the facts surrounding the underlying convictions.

¶ 107 I also cannot agree with the majority's conclusion that we can determine that Davis's sentence "shocks the societal conscience" *because of* "the reactions of the trial judge, the jurors, and the victims' mothers." Op. ¶ 49. Surely a test of constitutional validity cannot depend upon such subjective factors. Would the result required by the Eighth Amendment be different if these victims' mothers had been less understanding of Davis's conduct or more protective of their children? If the trial judge or jurors had not made their comments, would this case pass constitutional muster? Moreover, why should we look to these few individuals to define the societal conscience? The statute adopted by the legislature also reflects societal norms. Why should we regard the personal reactions of those involved in this particular case as more reflective of society's norms than is the legislation enacted by a representative body? I cannot agree that constitutional analysis should depend upon the subjective factors relied upon by the majority.

¶ 108 Finally, although I heartily agree with the majority that the inordinately long sentence involved here derives partly from the fact

that judges in Arizona have no discretion in deciding whether to impose consecutive sentences under these circumstances, I do not agree that the lack of discretion should be considered in our proportionality analysis. As the majority avers, in *Ewing v. California,* the Supreme Court referred to the facts that the crimes involved were "wobblers" and that both the prosecutor and the trial judge could exercise discretion in the treatment of such crimes. The Court expressly stated, however, "That grand theft is a 'wobbler' under California law is of no moment." *Ewing,* 538 U.S. at ----, 123 S.Ct. at 1189. We cannot, therefore, rely upon *Ewing v. California* to support the majority's discussion of the importance of judicial or prosecutorial discretion in conducting this proportionality review.

V.

¶ 109 For the foregoing reasons, I respectfully dissent from paragraphs 13 through 49 of the majority opinion. I concur in the remainder of the decision.

APPENDIX B

Division One
Court of Appeals
FILED Oct. 16 2001
GLEN D. CLARK, CLERK
By_____s/

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ANTHONY CHARLES DAVIS, Appellant.	)	1 CA-CR 99–1028 DEPARTMENT D MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 99–90084(B)

The Honorable Dennis W. Dairman, Judge

AFFIRMED

Janet Napolitano, Attorney General — Phoenix
by Randall M. Howe, Chief Counsel
Criminal Appeals Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Anna M. Unterberger, Deputy Public Defender
Attorneys for Appellant

¶ 1 Anthony Charles Davis (defendant) was convicted by a jury of four counts of sexual conduct with a minor under age fifteen, class 2 felonies and dangerous crimes against children. Defendant seeks a new trial as to counts one and four and appeals the sentences imposed on all four counts as cruel and unusual punishment. For the reasons stated, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 Defendant was charged with one count of engaging in sexual intercourse or oral sexual contact with T.E., a minor under the age of fifteen years on or about January 18, 1999, in violation of Arizona Revised Statutes (A.R.S.) § 13-1405(A) (Supp. 1999). Defendant was also charged pursuant to A.R.S. § 13-1405(A), with three counts of engaging in sexual intercourse or oral sexual contact with T.E.'s friend P.T., a minor under the age of fifteen years, on or about January 20, 1999, January 25, 1999 and January 29, 1999, respectively.

A. *Count One Relating to T.E.*

¶ 3 T.E. testified at trial that she met defendant in mid-January with her stepsister. T.E. and her stepsister went to defendant's house; T.E. was thirteen. Defendant told T.E. he was twenty; T.E. told defendant she was fourteen. T.E. testified they had sexual intercourse that night; defendant was charged with one count of sexual conduct with a minor under the age of fifteen based on this act. T.E. was also at defendant's house during the Super Bowl weekend; T.E. said defendant was in and out of the house. T.E. had sexual intercourse with defendant again on Super Bowl Sunday; no charges were filed based on this act.

¶ 4 T.E. stated that she previously had sex at the age of twelve and that defendant did not force her to have sexual intercourse with him.

Dr. Sylvia Strickland examined T.E. on February 3, 1999. She found a fresh tear on T.E.'s hymen which was consistent with her having intercourse within a one-week period. Detective Alonso interviewed T.E. T.E. told the detective she had sexual intercourse with defendant two or three times, the last time occurring during the Super Bowl weekend.

B. *Counts Two, Three and Four Relating to P.T.*

¶ 5 P.T. testified she went to defendant's house with T.E. and T.E.'s stepsister. She told defendant she was fourteen. P.T. had sexual intercourse with defendant that evening and two or three times after that. Defendant was charged with three counts of sexual conduct with a minor under the age of fifteen based on his conduct with P.T.

¶ 6 P.T. could not recall the exact dates when these acts occurred, but remembered telling a detective that she had sexual intercourse with defendant on January 20th, January 25th and on January 29th, which was the Friday before the Super Bowl weekend. However, P.T. also testified the last time she had sexual intercourse with defendant was before defendant visited her while she was babysitting. This occurred one or two days prior to Friday, January 29th. Defendant did not force P.T. to have sexual intercourse with him and Dr. Strickland's examination of P.T. did not reveal genital injury.

¶ 7 P.T.'s mother was notified when defendant was discovered visiting P.T. without permission while she was babysitting. As a result, P.T. and T.E. told their parents what had occurred with defendant and the police were called. While under investigation, P.T. placed a recorded confrontation call to defendant. P.T. told defendant she thought she was pregnant; he admitted having sexual intercourse with P.T. She also asked defendant if he had had sex with T.E. Defendant did not openly admit having sexual relations with T.E., but intimated that he may have done so by telling P.T. it was"before I met you."

¶ 8 Defendant testified at his trial on the four charges of sexual conduct with T.E. and P.T. Defendant denied sexual intercourse with

thirteen year-old T.E. He admitted having sexual intercourse with fourteen year-old P.T., but testified that P.T. told him she was eighteen. Defendant admitted visiting P.T. on Thursday, January 28th, while she was babysitting. Defendant testified he did not have sexual intercourse with P.T. after he learned she was under eighteen.

¶ 9 In support of an alibi defense with P.T. on count four, defendant testified that he worked the entire Super Bowl weekend, was away from home and slept in his truck. Defendant's employer corroborated defendant's testimony that he worked that weekend painting a house and that defendant finished about 4:00 a.m. Monday morning.

¶ 10 Over objection, the jury was instructed that:

> the State need not prove that a crime charged was committed on the exact day or days charged in the indictment. It is sufficient if the evidence shows beyond a reasonable doubt that the crime was committed by the defendant on or about the dates charged in the indictment.

The jury was also given an alibi defense instruction stating that:

> [t]he State has the burden of proving the defendant was present at the time and place the alleged crimes were committed. If you have a reasonable doubt whether the defendant was present at the time and place an [sic] alleged crimes were committed, you must find the defendant not guilty.

¶ 11 During closing argument, the prosecutor told the jury that as to T.E.

> only one time is charged in the indictment. . . . She simply said she had sex with him twice. The second time was that weekend of the Super Bowl.
> . . .

> Tanya testified that she had sex with him the very first night that they met which was around the 18th of January which is Count 1 on the indictment.

The verdict form relating to count one with T.E. eliminated the reference to the date of January 18, 1999. It was submitted to the jury without objection.

¶ 12 As to P.T., the prosecutor told the jury that the last time defendant had sexual intercourse with P.T. was either January 29th or before January 28th, so "[i]t's not real clear when the last sex occurred." She also later told the jury that the dates are not elements of the offenses so "if you believe that [defendant] had sex with [P.T.] on all three occasions like he said, then you don't have to worry about was it this date or that date."

¶ 13 The jury convicted defendant of all four counts. Defendant received statutory, mitigated sentences of 13 years on each count, the sentences to run consecutively as required by A.R.S. § 13-604.01(K) (Supp. 1999).

¶ 14 After the jury was excused and learned of the mandatory sentences to be imposed, the jury foreperson and another juror wrote letters to the trial judge expressing their opinions that under the circumstances of the case that the required sentences were excessive. The jurors signed a note stating that "[w]e the jury would like to request executive clemency for Anthony Charles Davis. We feel the punishment for the crime is excessive."

¶ 15 The trial court also entered a supplemental order pursuant to A.R.S. § 13-603(L) (Supp. 1999), stating that in the court's opinion, the sentences were excessive. The court noted that the defendant was twenty when he committed the offenses, had no adult prior criminal record and engaged in four acts of consensual sexual intercourse with two females ages thirteen and fourteen. The court noted that the jurors unanimously agreed the sentences were excessive. The court ordered that defendant could petition the Board of Executive Clemency for

commutation of his sentence within ninety days from the date he is committed to the custody of the Department of Corrections.

¶ 16 On appeal, defendant claims the trial court erred in instructing the jury that the state was not required to prove that the crime charged was committed on the exact day or days charged in the indictment. He claims the instruction and the verdict form for count one of the indictment improperly amended that count rendering it duplicitous and leading to the possibility of a non-unanimous jury verdict. He also claims the instruction improperly amended count four of the indictment and effectively "gutted" his alibi defense on that count. He requests a new trial on counts one and four. Defendant further contends that his sentences violate the Eighth Amendment to the United States Constitution and Ariz. 2, section 15 of the Arizona Constitution which prohibit cruel and unusual punishment.

DISCUSSION

A. *Did the Jury Instructions Improperly Amend the Indictment as to Counts I and IV?*

¶ 17 Defendant first claims the court constructively amended count one of the indictment by instructing the jury the state did not have to prove the exact date when the conduct occurred with T.E. and eliminating the reference to the date of the offense on the verdict form. He claims this rendered count one duplicitous and led to the possibility of a non-unanimous jury verdict. Defendant next claims that the trial court improperly amended the indictment and gutted his alibi defense by instructing the jury the state did not have to prove the exact date when the three sex acts occurred with P.T.

¶ 18 Under Rule 13.5(b), Ariz. R. Crim. P., a "charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding." "A defect may be considered formal or technical when its amendment does not operate to change the nature

of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980).

¶ 19 The date of the offense is not an element of the crime of sexual conduct with a minor under A.R.S. § 13-1405. The state is not required to prove that the offenses occurred on a particular date. *State v. Jones*, 188 Ariz. 534, 543, 937 P.2d 1182, 1191 (App. 1996) (date of offense not element of sexual assault under A.R.S. § 13-1406(A) and therefore not material to proof of state's case).

¶ 20 In considering whether the jury instruction improperly amended the indictment, we note that "[j]ury instructions must be viewed in their entirety when determining whether they adequately reflect the law. If the instructions are 'substantially free from error', the defendant suffers no prejudice by their wording." *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994) (citations omitted). A case should not be reversed unless it is reasonable to suppose the jury was misled by the instructions as a whole. *Id.* For the reasons stated below, the jury instruction given here did not misstate the law as to what the state was required to prove and was proper.

1. *Defendant's Claims as to Count I*

¶ 21 We reject defendant's argument that the jury instruction and the verdict form improperly amended count one to conform to the evidence so as to render it duplicitous. An indictment which charges two or more separate offenses in a single count is duplicitous. *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989). Duplicitous indictments are prohibited because they fail to give a defendant adequate notice of the charge to be defended, expose a defendant to the possibility of double jeopardy, and present a risk of a non-unanimous jury verdict. Id. In order to prevail on a claim of a duplicitous indictment, a defendant must demonstrate that he was actually prejudiced. *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993) (citation omitted).

¶ 22 This is not a true duplicitous indictment issue. Defendant was charged with only one crime in count one; the state was permitted to present evidence at trial that more than one crime occurred. *See State v. Schroeder*, 167 Ariz. 47, 52, n.4, 804 P.2d 776, 781, n.4 (App. 1990). Defendant's claim is that the jury may have used the removal of the date in the verdict form to convict him on the non-charged sexual conduct that occurred with T.E. over Super Bowl weekend. This claim is similar to that made in *Schroeder*.

¶ 23 In *Schroeder*, the defendant was charged with one count of sexual abuse. At trial, the victim testified to seven acts of sexual abuse all occurring on the same date. The defense was that the acts did not occur at all. On appeal, defendant argued that he was prejudiced by a duplicitous indictment. The court found the defendant was given adequate notice of the allegations through pretrial discovery and that specific acts introduced at trial barred retrial on double jeopardy grounds. *Id.*, 167 Ariz. at 52, 804 P.2d 781. Finally, like here, the defendant asserted that the jury's verdict could be non-unanimous because it was unknown whether the jurors all convicted on the same sexual act because the victim had testified as to multiple acts. The court concluded that because defendant used an all-or-nothing defense by claiming the events never occurred, it was a question of credibility and the jury must have "unanimously agreed that the child had been sexually abused by defendant." *Id.* at 52-53, 804 P.2d at 781-82; *see State v. Witwer*, 175 Ariz. 305, 309, 856 P.2d 1183, 1187 (App. 1993) (although defendant charged with single count of sexual abuse but several acts presented at trial, no risk of a non-unanimous jury verdict where case presented on "all-or-nothing" basis).

¶ 24 In this case, T.E. told a police officer that defendant engaged in two acts of sexual intercourse with her, the last occurring during the Super Bowl weekend. Defendant was charged based on the first act. Defendant had adequate notice of the allegations through pretrial discovery to prepare a defense and defendant has not shown otherwise. Double jeopardy bars a subsequent prosecution because evidence of both acts was introduced at trial. T.E. testified in detail as to the elements of the crime for the first act of sexual intercourse. As in

Schroeder, the victim was allowed to discuss other, non-charged, sex acts that occurred with defendant. Defendant denied that any sex acts occurred with T.E. at all.

¶ 25 Based on our review of the record, it is clear that the state presented evidence aimed at proving the first act of intercourse between T.E. and defendant. The first act was the act charged as count one. The jury verdict here indicates that the jury believed T.E. and did not believe defendant. Defendant has failed to show that the manner that the indictment was charged prejudiced him. Thus, no reversal is required. *Schroeder*, 167 Ariz. at 52-53, 804 P.2d at 781-82.[1]

¶ 26 As to the verdict form for count one which eliminated reference to the date of the offense, failure to object to a verdict form waives any error absent fundamental error. *See* Rule 21.3(c), Ariz. R. Crim. P.; *State v. Brown*, 188 Ariz. 358-59, 936 P.2d 181-82 (App. 1997). Defendant has failed to show that the verdict form which allegedly amended count one of the indictment changed the nature of the offense charged or prejudiced defendant in any way. *Cf. Jones*, 188 Ariz. at 544, 937 P.2d at 1192 (differences between dates of sexual assaults alleged in the indictment and more general dates provided by victim at trial which amended the indictment to conform to the evidence did not prejudice defendant where defendant denied acts occurred). Fundamental error did not result from the trial court's elimination of the alleged date of the offense in count one.

2. *Defendant's Claim as to Count IV*

¶ 27 Defendant next contends that the jury instruction that the state need not prove the exact date of his final sexual encounter with P.T.

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1. We do not agree with our dissenting colleague that *Spencer v. Superior Court*, 136 Ariz. 608, 667 P.2d 1323 (1983) compels a different result here. In *Spencer*, the duplicitous charge meant that it could not be determined what act was being tried, and Spencer was as a consequence "in jeopardy, in only two counts, for any one of what could be one hundred separate criminal offenses." 136 Ariz. at 611, 667 P.2d at 1326. Here, by contrast, it is clear what charges defendant faced.

"gutted" his alibi defense as to count four. This argument has been expressly rejected by the Arizona Supreme Court. *State v. Simmering*, 89 Ariz. 261, 264, 361 P.2d 4, 6 (1961) (not reversible error to give instruction that state was not required to prove that crime was committed on the exact day charged where it was followed by an alibi instruction); *State v. Sianez*, 103 Ariz. 616, 447 P.2d 874 (1968) (failure to require state to establish exact date for commission of crime not reversible error even though defendant raised alibi defense).[2]

¶ 28 In this case, P.T. told a detective she had sexual intercourse with defendant three times, with the last time being January 29, 1999. Count four alleged the act occurred on or about January 29, 1999. At trial, P.T. testified that this act occurred between approximately January 27 and 29, 1999. Defendant admitted having sexual intercourse with P.T. three times, but denied that the last time occurred on January 29, 1999.

¶ 29 Defendant was able to cross-examine P.T. fully about the discrepancy in her statements. Defendant presented an alibi for January 29, 1999 which was corroborated by his employer. The jury was instructed on his alibi defense theory. Defendant has failed to show that the jury instruction eliminating proof of the exact date the last offense occurred prejudiced him and requires reversal.

B. *Did the Sentences Constitute Cruel and Unusual Punishment?*

¶ 30 Defendant next contends the mandatory sentences imposed pursuant to A.R.S. § 13-1405(A) and A.R.S. § 13-604.01 are grossly

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2. In *State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973), relied upon by the dissent, the supreme court suggested that the time of a charged offense might become material if an alibi is interposed, but, in that case, rejected defendant's contention as inapplicable because his alibi was rejected by the jury. However, in *Hash v. State*, 48 Ariz. 43, 51, 59 P.2d 305, 308 (1936), the court squarely faced, and rejected, the argument that an alibi defense requires greater specificity in the charge, holding that, if a defendant can compel a precise allegation of time by interposing an alibi, the "leeway" properly allowed "for faulty memory or inaccuracy of date of occurrence is abolished."

disproportionate to the nature of the offenses committed and violate the federal and state constitutional prohibitions against cruel and unusual punishment. Because of their factual similarities to his case, defendant relies on the Arizona Supreme Court cases of *State v. Bartlett (Barlett I)*, 164 Ariz. 229, 233, 792 P.2d 692, 696 (1990) and *State v. Bartlett (Bartlett II)*, 171 Ariz. 302, 830 P.2d 823 (1992) to support his position. The remedy he proposes is to vacate the sentences and remand the matter for resentencing without regard to the provisions of A.R.S. § 13-604.01.

¶ 31 In *Bartlett I*, defendant was convicted of two counts of sexual conduct with a minor. Both victims engaged in consensual conduct with defendant. However, because the victims were under 15 years of age and the offenses were class 2 felonies and dangerous crimes against children under A.R.S. § 13-604.01, defendant received mandatory, minimum consecutive sentences totaling 40 years without the possibility of early release.

¶ 32 In determining the constitutionality of the sentences, the Arizona Supreme Court applied a three-prong analysis established in the United States Supreme Court case of *Solem v. Helm*, 463 U.S. 277 (1983). The court considered the gravity of the offense and harshness of the penalty, the sentences imposed for other crimes in Arizona and the sentences imposed for the same crime in other states. The court concluded that the sentencing provision of A.R.S. § 13-604.01 violated the eighth amendment prohibition against cruel and unusual punishment and could not constitutionally be applied to the defendant. *See Bartlett I* at 241, 792 P.2d at 704.

¶ 33 However, the state filed a petition for writ of certiorari to the United States Supreme Court in *Bartlett I*. The United States Supreme Court vacated the Arizona Supreme Court opinion and remanded for reconsideration of the decision in light of the then recently decided case of *Harmelin v. Michigan*, 501 U.S. 957 (1991).

¶ 34 In *Harmelin*, the defendant was convicted of possessing 672 grams of cocaine and was sentenced to life imprisonment without the

possibility of parole. Justice Kennedy's plurality opinion, later adopted by the Arizona Supreme Court, narrowed the proportionality analysis previously required by *Solem v. Helm*. According to this analysis, the court focuses on the offense generally without regard to the particular circumstances of the crime or the offender and only extreme sentences that are grossly disproportionate to the crime violate the Eighth Amendment. *See id.* at 1002-1005 (Kennedy, J., plurality). In the rare case, unless a sentence raises an inference of gross disproportionality, no intrajurisdictional or interjurisdictional analysis is required. See id. at 1005. The plurality opinion found that the offense in general was serious and that "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine-in terms of violence, crime, and social displacement-is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Id.* at 1003.

¶ 35 In Bartlett II, three members of the Arizona Supreme Court, applying *Harmelin v. Michigan*, reached the same result as in *Bartlett I* and concluded that the defendant's sentences violated the Eighth Amendment. *Bartlett II*, 171 Ariz. at 311, 830 P.2d at 832. However, two members of the court dissented, finding that in light of *Harmelin,* defendant's sentences were constitutional. *Id.* at 316, 830 P. 2d at 837.

¶ 36 Justice Corcoran stated that "[i]n conducting this inquiry, I believe that we must look not at the facts or particular circumstances of the crime, but we must decide whether the legislature could, with reason, conclude that the *threat posed to the individual and to society* by defendant's offenses is momentous enough to warrant the deterrence and retribution of the sentences imposed." *Id.* at 314, 830 P.2d at 835 (Corcoran, J., dissenting) (italics in original.) Justice Corcoran found a rational basis for the defendant's sentences and concluded that if Michigan could impose a life sentence upon a first-time offender for possession of cocaine as part of the "war against drugs," Arizona could constitutionally impose a forty year sentence on a first time offender who had sexual intercourse with two 14-year old girls as part of the "war against the sexual abuse of children." *Id.* at 316, 830 P.2d at 837.

¶ 37 In *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996), *Bartlett II* was revisited. There, the defendant was convicted of two counts of intentional or knowing child abuse after she attempted suicide by asphyxiation with her two children. 187 Ariz. at 28, 926 P.2d at 495. She was sentenced to two consecutive prison terms of 17 years each without the possibility of early release. She claimed her sentence was cruel and unusual under the Eighth Amendment. A three-member majority of the court analyzed her sentence in light of *Harmelin v. Michigan* and concluded that her sentence was not cruel and unusual. *DePiano*, 187 Ariz. at 29–30, 926 P.2d at 497. The court also reconsidered it's opinion in *Bartlett II*. It held that:

> In *State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992) *(Bartlett II)*, this court agreed that, at least until the Supreme Court of the United States reached a majority on the issue, it would use the standard articulated by Justice Kennedy to resolve such questions under the Eight [sic] Amendment. But three members of this court looked to the particular facts and circumstances of the crime and the offender in analyzing the threshold question of gross disproportionality. Two members of this court would have done what Justice Kennedy did, not look at the particular crime or the particular offender, but whether the offense generally poses a sufficient threat to warrant the sentence imposed.
>
> We do not believe that *Bartlett II* is entitled to the sort of precedential value one ordinarily would associate with an opinion of this court. The court was almost equally divided on the meaning of a *plurality* opinion of the United States Supreme Court. We are thus left with two levels of informed speculation. The first is whether the plurality opinion in *Harmelin* would command a majority today. The second is whether the majority or the minority read *Harmelin* correctly in *Bartlett II*. We agree with *Bartlett II* that until the Supreme Court of the United States holds otherwise, we shall follow Justice

> Kennedy's plurality opinion. But we disapprove of that part of *Bartlett II* that concludes that Justice Kennedy's analysis would require an examination of the facts and circumstances of the particular crime and the particular offender. We agree with the minority in *Bartlett II* that the initial threshold disproportionality analysis is to be measured by the nature of the offense generally and not specifically. We think this is particularly true for serious violent offenses.

Id.

¶ 38 Thus, when conducting a disproportionality analysis, the court does not look to the circumstances of the particular crime or the offender. Rather, it considers the general nature of the offense and whether the legislature could reasonably conclude that such offense poses a sufficient threat to the individual and to society to warrant the sentence imposed. *See Wigglesworth v. Mauldin*, 195 Ariz. 432, 437, 990 P.2d 26, 31 (App. 1999).

¶ 39 The dissenters in *Bartlett II* determined that the defendant's 40-year sentence was not grossly disproportionate to the severity of defendant's crimes in light of the threat posed to the individual and to society by engaging in sexual misconduct with minors. *See Bartlett II,* 171 Ariz. at 314–15, 830 P.2d at 835–36 (Corcoran, J., dissenting). The legislature has a rational basis to punish severely those persons who commit sexual offenses against minors. *State v. Arnoldi*, 176 Ariz. 236, 242, 860 P.2d 503, 509 (App. 1993). Because the threshold analysis does not lead to an inference of gross disproportionality, we need not engage in an intrajurisdictional or interjurisdictional analysis. We find that defendant's sentences do not violate the Eighth Amendment prohibition against cruel and unusual punishment.[3]

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3. We note that the judge and jurors believed the sentences here were excessive. However, even if we agreed, we have no authority to reduce the sentences under A.R.S. § 13–4037(B) because defendant received the minimum, mandatory sentences.
(continued...)

CONCLUSION

¶ 40 We have reviewed the issues raised by defendant. We affirm his convictions and sentences.

s/_____
JON W. THOMPSON, Judge

CONCURRING:

s/_____
MICHAEL D. RYAN
Presiding Judge

N O Y E S, Judge, Concurring in part and Dissenting in part,

¶ 41 I agree with affirming the convictions and sentences on Counts 2 and 3. I would reverse and remand on Counts 1 and 4.

¶ 42 The trial court's clear error in allowing the State to prosecute Defendant for two crimes in Count 1 was not harmless, for it encouraged a less-than-unanimous verdict on that count. The trial court's clear error in removing the date of the offense from Counts 1 and 4 was not harmless, either, for that error compounded the prejudicial effect of the first one, and it gutted the alibi defense Defendant raised to one of the charges in Count 1, and to the only charge in Count 4. The State took advantage of these errors by telling the jury that the dates of the offenses were not "important" or "necessary."

¶ 43 To affirm the Count 1 conviction, the majority relies on *State v. Schroeder*, 167 Ariz. 47, 804 P.2d 776 (App. 1990). That case is

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3. (...continued)
Executive Clemency is the only avenue of relief. *See DePiano*, 187 Ariz. at 32, 926 P.2d at 499.

distinguishable because those crimes occurred on the same date, and that defendant had no alibi for any of them. In regard to the present case, the comparable facts and applicable law are found in *Spencer v Superior Court*, 136 Ariz. 608, 667 P.2d 1323 (1983), which held that an indictment that charged several specific, separately dated crimes in one count was "inadequate by virtue of its duplicity." Id. at 611, 667 P.2d at 1326. We should reverse and remand on Count 1.

¶ 44 To affirm the Count 4 conviction, the majority cites the general Arizona rule that the exact date of the offense need not be charged or proved, even when defendant has an alibi defense. The general rule does not apply, however, where eliminating the date of the offense would also eliminate the alibi defense. "The exact time [of the offense] was not a material ingredient of the crime, unless it deprived the defendant of his defense of alibi." *State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973). In the present case, when the trial court instructed the jury that the State did not have to prove the charged dates of the offenses, it deprived Defendant of his alibi defense by rendering it immaterial. We should reverse and remand on Count 4.

¶ 45 The criminal conduct in this case was that a young man had consensual sex with two teenage girls. He was wrong to do that. His punishment is the minimum one permitted by the State's multiple charges and the legislature's mandatory-sentence laws. His punishment is fifty-two years in prison, with no early release. That sentence is lawful but absurd, and it is manifestly unjust. If we reversed on Counts 1 and 4 and the State did not retry them, the resulting twenty-six-year sentence is still manifestly unjust. This case is appropriate for executive clemency.

s/_____
E. G. NOYES, JR., Judge